

Supreme Court, U.S.
FILED

AUG 8 1979

MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,

Petitioner,

—v.—

PENSION BENEFIT GUARANTY
CORPORATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED
APRIL 12, 1979
CERTIORARI GRANTED JUNE 18, 1979

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**CHRONOLOGICAL LIST
OF RELEVANT DOCKET ENTRIES**

1976

- August 9 Filed Complaint.
- October 21 Filed Motion of Defendant Pension Benefit Guaranty Corporation to Dismiss Complaint
- October 21 Filed Memorandum in Support of Motion of Defendant Pension Benefit Guaranty Corporation to Dismiss Complaint.

1977

- January 12 Filed Plaintiff's Memorandum in Opposition to Motion to Dismiss.
- January 28 Filed Reply of Defendant Pension Benefit Guaranty Corporation to Plaintiff's Memorandum in Opposition to Motion to Dismiss.
- March 25 Enter Order dated March 24, 1977 denying Defendant's motion to dismiss.
- April 5 Filed International Union, United Automobile, Aerospace and Agricultural Implement Workers of America's motion to intervene.
- April 5 Filed UAW's memorandum in support of motion to intervene.
- April 15 Filed Plaintiff's Memorandum in Opposition to Motion of United Auto Workers to Intervene.
- April 25 Filed Nachman Corporation's Motion for Judgment on the Pleadings or for Summary Judgment.

- May 5 Filed Reply Memorandum of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) in Support of its Motion to Intervene as a Party Defendant.
- May 6 Filed Response of Defendant Pension Benefit Guaranty Corporation to Motion to Intervene.
- June 9 Enter Order dated June 9, 1977 granting Motion of UAW to Intervene.
- June 16 Filed Intervenor-Defendant's UAW's cross-motion for summary judgment.
- June 16 Filed Intervenor-Defendant's UAW's memorandum in support and response.
- June 16 Filed Affidavit of Robert Kryvicky.
- June 16 Filed Motion of defendant Pension Benefit Guaranty Corporation for summary judgment, including Affidavit of Joseph E. Ellinger.
- June 23 Filed Plaintiff's reply memorandum in support of its motion for judgment on the pleadings or for summary judgment and in opposition to motions of defendant and intervening defendant for summary judgment.
- September 16 Enter Order and Memorandum Opinion dated September 15, 1977, granting Plaintiff's motion for summary judgment and denying Defendants' cross-motions for summary judgment.
- September 16 Enter Rule 58 Judgment.
- October 7 Filed UAW Notice of Appeal.
- November 17 Filed PBGC Notice of Appeal.

1979

- January 23** Filed Opinion of Court of Appeals.
January 23 Filed Judgment Order of Court of Appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 76 C 2963

NACHMAN CORPORATION
an Illinois corporation,

Plaintiff,

vs.

PENSION BENEFIT GUARANTY CORPORATION
A body corporate established within the United States De-
partment of Labor,

Defendant.

COMPLAINT

Filed August 9, 1976

Now comes Nachman Corporation, an Illinois corporation, by Selwyn Zun, Lawrence R. Levin, Robert W. Gettleman and Joel D. Rubin, its attorneys, and as its complaint against the Pension Benefit Guaranty Corporation, a body corporate established within the United States Department of Labor pursuant to 29 U.S.C. §1302, states as follows:

1. Nachman Corporation ("Nachman") is an Illinois corporation having its principal place of business in Chicago, Illinois. The Pension Benefit Guaranty Corporation (the "PBGC") is a body corporate established within the United States Department of Labor which is granted, among other things, all the powers conferred on a nonprofit corporation under The District of Columbia Nonprofit Corporation Act. The matters here in controversy exceed, exclusive of interest and costs, the sum of Ten Thousand Dollars (\$10,000). Juris-

diction of this court is founded upon 28 U.S.C. §§1331 and 1349, and 29 U.S.C. §1302(b).

2. Nachman for many years carried on a portion of its manufacturing business at 4560 West Armitage Avenue, Chicago, Illinois (the "Chicago North Plant"). Certain of the hourly employees of Nachman employed at the Chicago North Plant elected the United Automobile, Aircraft and Agricultural Implement Workers of America (the "UAW") as their collective bargaining agent. As part of the collective bargaining agreement for the period commencing November 1, 1958, Nachman and the UAW agreed to establish a pension plan and Nachman contracted to "fund a sum equal to six cents (6¢) per hour for each employee in the unit which is the subject of this Collective Bargaining Agreement into a Pension Plan, the details of which shall be drawn up and mutually agreed to between the Company and the Union....." Nachman formally entered into a pension plan with the UAW on February 29, 1960 (the "Retirement Plan"). Successor collective bargaining agreements have increased the amount that Nachman was to fund into the Retirement Plan. The Retirement Plan has been amended from time to time but none of the amendments effect the substantive issues presented by this action. A copy of the relevant provisions of each collective bargaining agreement between Nachman and the UAW, commencing with the 1958 agreement and including the final agreement in 1972 (which expired October 31, 1975) and the Retirement Plan with all amendments thereto are attached hereto, marked Exhibits A and B respectively and incorporated herein. The plan year of the Retirement Plan is the calendar year.

3. The Retirement Plan provides for four types of retirement benefits:

(a) *Category A*—An employee with 10 or more years of continuous service with Nachman who terminates his employment after age 65 is eligible for a monthly benefit during

his lifetime equal to a sum certain multiplied by such retired employee's years of continuous service;

(b) *Category B*—An employee with 10 or more years of continuous service with Nachman who terminates his employment between the ages of 60 and 65 is eligible for the benefit set forth in Category A commencing upon his attaining age 65 or an amount equal to such benefit reduced by 6/10ths of 1% for each month between the date payment commences and the date upon which he would have attained age 65 in either case provided he is living on the date payment commences;

(c) *Category C*—An employee with 15 or more years of continuous service who becomes disabled is eligible for a disability benefit subject to certain conditions not applicable here; and

(d) *Category D*—An employee with 15 or more years of continuous service with Nachman who terminates his employment between ages 45 and 60 is eligible for a benefit equal to a sum certain multiplied by such employee's years of continuous service, such benefit to commence upon his attaining age 65 provided he is then living and has made application therefor no earlier than 60 days prior to his 65th birthday and no later than his 70th birthday.

4. Article IV, Section 2 of the Retirement Plan provides:

"The Company agrees to contribute to the Fund as its obligation hereunder for each Plan Year an amount as determined by the Actuary equal to the least of the following amounts:

(a) The sum of the following:

(1) The normal costs of providing the benefits under the Plan;

(2) The portion attributable to such Plan Year of the amount required to fund in full on a level basis over a 30-year period the accrued liability on the Effective Date; plus

(3) The estimated amount necessary to cover such administrative costs as are payable from the Fund for such Plan Year;

or

(b) The maximum amount that is deductible for Federal Income Tax purposes for the taxable year of the Company ending with or within such Plan Year." (Exhibit B, p.15).

5. Article IV, Section 5 of the Retirement Plan provides:

"Payments by the Company to the Trustee of the contributions determined under Sections 1 [the initial \$1,000 contribution] and 2 of this Article shall be in complete discharge of the Company's financial obligation under this Plan. The Company will cause the Board [the administrator of the Plan] to be furnished with a certificate of the Actuary at least annually, as to compliance with the funding requirements contained herein." (Exhibit B, p.16).

6. Nachman has contributed to the Trust Fund under the Retirement Plan sufficient amounts to discharge its obligations under its collective bargaining agreements with the UAW and under Sections 1 and 2 of Article IV of the Plan.

7. Article V, Section 3 of the Plan provides in part:

"Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid." (Exhibit B, p.18).

8. Section 1 of Article IX of the Retirement Plan permits amendment of the Plan to comply with the Internal Revenue Code and federal and state law but in no case is any modification or amendment permitted which would change the amount Nachman is required to contribute under the Plan.

9. Section 2, Article X of the Retirement Plan provides in part:

"In the event that either party desires to terminate this Agreement and Plan, it shall give the other party 90 days

prior written notice thereof, which notice may be served at any time during the negotiations referred to in Section 3 of Article IX [which can only commence after August 31, 1975], or at any time after August 31, 1975, whichever time is earlier." (Exhibit B, p.30).

10. Pursuant to Article X, Section 2 of the Retirement Plan, Nachman delivered notice to the UAW on October 1, 1975 of its intention to close the Chicago North Plant and to terminate the Retirement Plan effective December 31, 1975 and the Retirement Plan was so terminated.

11. Under the Retirement Plan the assets in the Trust Fund on December 31, 1975 were sufficient to pay benefits to all those present and former employees who were eligible on or before the date of termination of the Retirement Plan to receive a normal or early retirement benefit (Category A and B, respectively); however, the assets were and presently are insufficient to pay employees who, on the date of termination, had completed 15 years of continuous service but were not eligible to receive retirement benefits under Categories A and B.

12. Prior to the effective date of the Employee Retirement Income Security Act of 1974 ("ERISA"), the only applicable law relating to retirement plans was the Internal Revenue Code of 1954, as amended, 26 U.S.C. §§1 et. seq., (the "IRC"). The IRC prior to amendment by ERISA: (i) did not require any benefit to be paid to employees who terminated prior to retirement; (ii) permitted benefits which were being paid to retired employees to be defeasible under certain circumstances; and (iii) provided that upon termination of such retirement plan an employer need not be liable for the benefits set forth in the plan, except to the extent such benefits could be satisfied with the assets existing in the trust fund of the plan on the date of termination.

13. ERISA requires that retirement plans in existence on January 1, 1974 be amended for plan years commencing after December 31, 1975 to provide a "nonforfeitable" benefit to

employees who terminate their employment prior to retirement if such employees have completed certain minimum service requirements. ERISA further prohibits forfeiture under any circumstances of any benefit which becomes "nonforfeitable" under the terms of the plan, unless such benefit is more liberal than ERISA requires.

14. Title IV of ERISA (29 U.S.C. §§1301 et. seq.) creates the PBGC, provides that, beginning June 30, 1974, the PBGC will guarantee the payment of all "nonforfeitable" benefits under the terms of the Plan (subject to certain limitations which are not material to the issues presented in this Complaint), and further creates a right of subrogation against the employer sponsoring the plan.

15. "Nonforfeitable" as used in ERISA is defined as follows:

"The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." 29 U.S.C. §1002(19).

16. On December 17, 1975 Nachman, pursuant to Section 4041(a) of ERISA (29 U.S.C. §1341), notified the PBGC of Nachman's intention to terminate the Retirement Plan effective December 31, 1975. The notice stated that the assets of the Plan are less than the accrued value of the benefits provided in the Retirement Plan and that since the benefits under the terms of the Plan are unconditional and legally enforceable only to the extent funded and are, therefore, *not* "nonforfeitable" as such term is defined in ERISA, there is no liability on the part of Nachman to the PBGC.

17. Nachman is not liable to the PBGC for any amounts which would be required to continue to fund the benefits provided under the Retirement Plan as set forth in paragraph 3 hereof since:

(a) Under the collective bargaining agreements with the UAW, Nachman was obligated to fund only a certain amount per hour for each employee;

(b) The Retirement Plan provides that upon termination benefits are to be paid only to the extent they are funded;

(c) The PBGC guarantees, and can claim by way of subrogation against the employer, only benefits which are "nonforfeitable";

(d) The benefits under the Retirement Plan for which the assets are insufficient are not "nonforfeitable" (as defined in ERISA) for the following reasons:

(i) The benefits under the terms of said Plan are unconditional and legally enforceable only to the extent they are funded; and

(ii) such benefits were not required to be provided and, in any event, if provided, were not required to be made "nonforfeitable" prior to December 31, 1975;

(e) Retirement plans in existence on January 1, 1974 were not required to provide "unconditional and legally enforceable" benefits until the plan year commencing after December 31, 1975, the date the Retirement Plan was lawfully terminated;

(f) Regardless of whether the PBGC determines that it should guarantee the payment of benefits in excess of the amounts funded to date, no rights exist against Nachman since the benefits in question were not "nonforfeitable"; and

(g) To subject Nachman to liability on the grounds that ERISA changed the terms of—

(i) its collective bargaining agreement with the UAW before Nachman was able under such collective bargaining agreement and under the Retirement Plan to terminate such Plan, and

(ii) the Retirement Plan before such Plan was required by law to amend its substantive provisions to conform with ERISA,

would violate Nachman's rights under Article I, Section 10 and the Fifth Amendment to the United States Constitution.

18. The PBGC failed to determine whether the assets of the Retirement Plan are sufficient and on March 31, 1976 requested Nachman to extend the 90-day period during which the PBGC was to determine such sufficiency for an additional 120 days.

19. The PBGC has, pursuant to Section 4041(e), 29 U.S.C. §1341, internally determined that the Retirement Plan is unable to pay all basic benefits under such Plan when due, and seeks reimbursement from Nachman. Representatives of Nachman have met with officials of the PBGC and have denied liability for the reasons set forth in this complaint. However, unless enjoined by this court, the PBGC will issue a deficiency notice under Section 4042, 29 U.S.C. §1342. Officials of the PBGC have orally notified Nachman that if a formal deficiency notice is issued under Section 4042, 29 U.S.C. §1342, Nachman will lose its right to fund the deficiency over an extended period of time, or in the alternative, its ability to purchase commercial annuities to fund the retirement benefits (the cost of which is less than funding the liability through the PBGC). As a result Nachman requested an extension to August 31, 1976 in order that it would have sufficient opportunity to file this complaint before the PBGC issues its formal deficiency notice.

20. There exists an actual and present controversy between the parties hereto as to their rights and liabilities under the Plan and ERISA, requiring adjudication by this court pursuant to 28 U.S.C. §§2201 and 2202.

WHEREFORE, Nachman prays for Judgment as follows:

1. Declaring that Nachman has no liability under Section 4062 of ERISA, 29 U.S.C. §1362, for any funding deficiency under the Retirement Plan;

2. Enjoining, preliminarily and then permanently, the PBGC from issuing a deficiency notice under Section 4042, 29 U.S.C. §1342, until this court has ruled on Nachman's request for a declaration of its liability under Section 4062 of ERISA, 29 U.S.C. §1362; and

3. For such further relief as the court may deem proper.

Respectfully submitted,

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STATE OF ILLINOIS } ss.
COUNTY OF COOK }

VERIFICATION

Lawrence W. Newman being first duly sworn, on oath, deposes and says that he is the Treasurer and Controller of Nachman Corporation, plaintiff herein, that he has read the foregoing Complaint, and that upon his personal knowledge, the allegations set forth therein are true.

LAWRENCE W. NEWMAN
Lawrence W. Newman

Subscribed and sworn to
before me this 3rd day
of August, 1976.

Notary Public

Complaint Exhibit A

PENSION PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

ARTICLE XVII

(Effective November 1, 1958 through October 31, 1961)
Pensions

The Company and the Union agree that all employees in the unit covered by this Collective Bargaining Agreement shall be covered by a Pension Plan to be implemented in the following manner:

The Company will fund a sum equal to six cents (6¢) per hour for each employee in the unit which is the subject of this

Collective Bargaining Agreement into a Pension Plan, the details of which shall be drawn up and mutually agreed to between the Company and the Union. This funding to commence when the Pension Plan has been formulated and has received United States Treasury approval.

ARTICLE XVII

(Effective November 1, 1963 through October 31, 1966
Pensions

The Company and the Union agree that the existing Pension Plan covering all employees in the collective bargaining unit shall be continued during the term of this Agreement subject to the following modification:

Effective November 1, 1964, the Company will fund an additional one cent (1¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits.

Effective November 1, 1965, the Company will fund an additional one cent (1¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits.

ARTICLE XVII

Effective November 1, 1966 through October 31, 1967
Pensions

The Company and the Union agree that the existing Pension Plan covering all employees in the collective bargaining unit shall be continued during the term of this Agreement subject to the following modifications:

Effective November 1, 1964-65, the Company will fund an additional one cent (1¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits.

ARTICLE XVII

(Effective November 1, 1967 through October 31, 1970
Pensions

The Company and the Union agree that the existing Pension Plan covering all employees in the collective bargaining

unit shall be continued during the term of this Agreement subject to the following modifications:

Effective November 1, 1964-65, the Company will fund an additional one cent (1¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits.

ARTICLE XVII

(Effective November 1, 1970 through October 31, 1972)

Pensions

The Company and the Union agree that the existing Pension Plan covering all employees in the collective bargaining unit shall be continued during the term of this Agreement, subject to the following modification:

Effective November 1, 1970, the Company will fund an additional one cent (1¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits. Effective November 1, 1971, the Company will fund an additional one and one-half (1½¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits.

ARTICLE XVII

(Effective November 1, 1972 through October 31, 1975)

Pensions

The Company and the Union agree that the existing Pension Plan covering all employees in the collective bargaining unit shall be continued during the term of this Agreement, subject to the following modification:

Effective November 1, 1972, the monthly pension benefit provided for employees retiring on or after November 1, 1972, shall be \$3.25. Effective November 1, 1973, the monthly pension benefit provided for employees retiring on or after November 1, 1973 shall be \$3.50.

[Complaint Exhibit B]

NACHMAN CORPORATION (CHICAGO PLANT) AGREEMENT AND PENSION PLAN

This Agreement entered into the 29th day of February, 1960, at Chicago, Illinois, by and between Nachman Corporation, an Illinois Corporation (herein called the "Company"), and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW) affiliated with AFL-CIO, and its Local 1003 (herein called the "Union").

ARTICLE I ESTABLISHMENT OF PLAN— INTERNAL REVENUE APPROVAL

1. The Nachman Corporation (Chicago Plant)—UAW Pension Plan (herein called the "Plan") is hereby established, subject to the provisions of this Agreement, for the purposes of providing old age and disability retirement income security to employees of the Company covered hereunder.
2. Promptly after the execution and delivery hereof, the Company, at its expense, shall file an application (together with all necessary supporting data) with the Internal Revenue Service for a ruling or determination to the effect that (a) this Plan meets the requirements of Section 401 of the Internal Revenue Code of 1954, (b) the trust under the Trust Agreement (hereinafter specified) is entitled to exemption under Section 501 of the Internal Revenue Code of 1954 and (c) contributions to the Fund (hereinafter specified) will be deductible from gross income under Section 404 of the Internal Revenue Code of 1954, subject to verification and examination of the Company's income tax returns.
3. This Plan shall become effective on the first day of the month in which the favorable ruling or determination letter

issued by the Internal Revenue Service in response to such application, is made pursuant to Section 2 of this Article I.

ARTICLE II DEFINITIONS

The terms defined in this Article for all purposes of this Plan shall have the respective meanings hereinafter set forth:

Actuary—An actuary, designated by the Company, who is a member of the Society of Actuaries, or a firm of actuaries, designated by the Company, at least one of whose members is a member of the Society of Actuaries.

Bargaining Unit—The group of employees for which the Union has been recognized as the sole and exclusive bargaining agent pursuant to Article IX, Section 1 of the "Collective Bargaining Agreement."

Board—The Board of Administration provided for in Article III hereof.

Collective Bargaining Agreement—The Collective Bargaining Agreement, dated November 25, 1958, entered into by and between the Company and the Union.

Credited Service—The aggregate number of years (and fractions thereof as herein specified) of Past Service Credits and Future Service Credits to which an "Employee" is entitled, determined in accordance with Article VI hereof, but in no event more than 30 years.

Deferred Early Retirement Benefit—An amount equal to the normal retirement benefit of a "Retired Employee," who, having been eligible for early retirement, has elected to receive such Deferred Early Retirement Benefit commencing at age sixty five (65).

Disability Retirement Benefit—An amount payable monthly to a Retired Employee eligible to receive a Disability Retirement Benefit hereunder equal to either (i) Eighty Dollars (\$80.00) if such Retired Employee is not eligible for Disability Insurance Benefits under the Social Security Act; or (ii) one

Dollar and Sixty Cents (\$1.60) multiplied by such Retired Employee's Credited Service at time of retirement for Permanent and Total Disability, but not to exceed Forty-eight Dollars (\$48.00) if such Retired Employee is eligible for Disability Insurance Benefits under the Social Security Act, reduced in either case by Other Benefits, if any, of such Retired Employee.

Effective Date—The first day of the month in which the favorable determination or ruling letter of the Internal Revenue Service, referred to in Article I hereof, is received.

Employee—Any person employed by the Company who has "Seniority" status on or after the Effective Date, and is represented by the Union in the Bargaining Unit, provided that such term shall also include any former Retired Employee who has returned to active service with the Company and is represented by the Union in the Bargaining Unit.

Fund—The Trust Fund to be established by the Company as provided in Article IV, as it is originally constituted and as it may thereafter be constituted, pursuant to the provisions of the "Trust Agreement."

Immediate Early Retirement Benefit—An amount, payable monthly, equal to the Deferred Early Retirement Benefit of a Retired Employee, who having been eligible for early retirement, has elected to receive an Immediate Early Retirement Benefit, such amount to be reduced by 6/10 of one per cent for each complete calendar month included in the period from the date of early retirement to and including the date on which such Retired Employee would have reached age 65.

Normal Retirement Benefit—A monthly amount equal to One Dollar and Sixty Cents (\$1.60) multiplied by a Retired Employee's Credited Service, but not to exceed a maximum of Forty Eight Dollars (\$48.00).

Other Benefits—

(i) Any disability payments which a Retired Employee receives or would be entitled to receive under any present or future law of the United States (excluding "disability insurance benefit" under the Federal Social Security Act), or of any state, district, territory, or subdivision thereof, irrespective of any factor which may disqualify him for or diminish such benefits, such as, but not limited to, his engaging in employment for compensation or profit or failing to make a proper application, and which is paid from a source or fund to which the Company shall have contributed or would be required by law to contribute; and

(ii) Payments under any workmen's compensation or occupational disease law (except fixed statutory payments for the loss of any bodily member) and any disability damages recovered from the Company under common law. For the purposes hereof, lump sum payments under workmen's compensation or occupational disease laws shall be divided by the weekly payment on the basis of which such lump sum payment shall have been fixed, and the amount so determined shall be deemed to have been paid each week until exhausted, commencing with the date of receipt of such lump sum payment, and any such lump sum damages recovered from the Company shall be divided by 260 and the amount so determined shall be deemed to have been paid each week until exhausted commencing with the date of receipt of such damages.

Permanent and Total Disability—A physical or mental condition of a Retired Employee, determined by the Board on the basis of medical evidence in accordance with the provisions of Article VIII hereof, which will be reasonably certain to be permanent and continuous during lifetime, and which will prevent such person from engaging in any gainful occupation or employment (except such employment as is found to be for the purposes of rehabilitation), provided, however, such term

shall not include any condition (a) consisting of chronic alcoholism or addiction to narcotics, (b) contracted, suffered or incurred while engaging in a felonious criminal enterprise, (c) resulting from intentionally inflicted injury or self-induced sickness, or (d) resulting directly or indirectly from injury or disease while serving in the armed forces or merchant marine of any country.

Plan Year—The twelve-month period ending on the day in each calendar year which is the day before the anniversary of the Effective Date.

Retired Employee—A former Employee whose employment with the Company shall have terminated after the Effective Date under circumstances entitling him to a benefit hereunder commencing as provided in Article VIII, and who shall not have been re-employed by the Company; but such term shall not include a person with respect to whom a Disability Retirement Benefit shall have been terminated under circumstances not entitling such person to a Normal Retirement Benefit payable upon such termination.

Seniority—The number of years (and fractions thereof, as herein specified) included in the term "Seniority" as defined in Article XVIII of the Collective Bargaining Agreement.

Trust Agreement—The Agreement to be entered into between the Company and the "Trustee" as provided in Articles IV and V, as it originally exists and as it may be amended from time to time.

Trustee—The bank or trust company acting as trustee under the Trust Agreement.

Vested Deferred Retirement Benefit—A monthly amount equal to One Dollar and Sixty Cents (\$1.60) multiplied by the Credited Service of a former Employee, but not to exceed a maximum of Forty Eight Dollars (\$48.00), provided such former Employee having been eligible for a Vested Deferred Retirement Benefit has made application therefor at the time and in the manner in Article VIII provided.

ARTICLE III ADMINISTRATION OF THE PLAN

1. This Plan shall be administered by a Board of Administration, three members of which shall be appointed by the Company, (hereinafter referred to as the "Company members"), and three members of which shall be appointed by the Union, (hereinafter referred to as the "Union members"). No monies shall be paid from the Fund for the compensation and expenses, if any, of the members of the Board. Compensation and expenses, if any, of the Company members shall be paid by the Company and compensation and expenses, if any, of the Union members shall be paid by the Union.

2. The Company at any time may remove a Company member and the Union at any time may remove a Union member. Any vacancy, caused by death, removal or inability to act, among Company members shall be filled by a new appointment made by the Company and any vacancy, for any such reason, among Union members shall be filled by a new appointment by the Union. Any such appointment or removal shall be effective only on the date specified therefor in a prior notice in writing, delivered by the appointing or removing party to the other party hereto, and which notice shall set forth the name or names of the member or members so appointed or removed.

3. The Board shall meet at such times as may be mutually agreed upon by its members for the expeditious transaction of necessary business. To constitute a quorum for the transaction of business, there shall be required to be present at any meeting of the Board at least two Union members and two Company members. At all meetings of the Board, the Company members shall have a total of three votes and the Union members shall have a total of three votes, the vote of any absent member being divided equally between the members present appointed by the same party. Decisions of the Board shall be by majority of the votes cast. In case any matter

arising in the course of the Board's administration of this Plan cannot be settled by a majority vote of the Board, the Board, by a majority vote, shall promptly appoint an Impartial Chairman, whose vote shall settle any such disputed matter, provided that such Impartial Chairman shall not vote at meetings of the Board under other circumstances. In the event of a deadlock in the selection of an Impartial Chairman by the Board (which shall continue for more than ten days in respect of any single matter in dispute), the Impartial Chairman shall be selected in the same manner as the arbitrator is selected under the Collective Bargaining Agreement, except that the Company members of the Board shall act in lieu of the Company representative and the Union members of the Board shall act in lieu of the Union representative. At any meeting of the Board at which an Impartial Chairman is acting, the Union and the Company shall have the right to submit to the Board, and the Board shall receive, such evidence as may be material to the matter in dispute. All fees and expenses of the Impartial Chairman shall be paid from the Fund.

4. The Board in its administration of this Plan shall have the following functions:

(a) It shall prescribe procedures to be followed by employees in filing applications for benefits and for the furnishing of evidence necessary to establish Employees' rights to such benefits;

(b) It shall make determinations of eligibility for benefits based upon the provisions of this Plan, and shall afford any individual dissatisfied with any such determination the right to a hearing thereon;

(c) It shall develop procedures for the establishment and verification of Credited Service of Employees, and after affording Employees an opportunity to make objection with respect thereto, it shall establish such facts conclusively in advance of retirement;

(d) It shall act promptly upon applications for benefits and shall notify the applicant and the Company in writing, whether or not, on the basis of the information submitted, the applicant is eligible under this Plan and, if so, the amount of his benefit;

(e) If an application for benefits is approved, it shall direct the Trustee, in writing, to make benefit payments to the applicant from the Fund, and it shall direct the Trustee to make payments from the Fund for the Trustee's fees and expenses, for the Actuary's fees and expenses, for the fees and expenses of examining physicians or clinics, and for other expenses necessary for the proper administration of the Plan, all such directions to the Trustee to be signed by at least two Union members and two Company members;

(f) It shall make the allocations set forth in Article X hereof, in the event of termination of this Plan;

(g) It shall designate the medical clinics and/or physicians to make the examinations provided for in Article VIII hereof;

(h) It shall furnish to the Company and to the Union, upon request, such reports with respect to its administration of the Plan as are reasonable and appropriate; and

(i) It shall notify each employee whose employment with the Company shall have terminated at a time when such employee shall have satisfied the eligibility requirements for a Vested Deferred Retirement Benefit, of the fact of such eligibility.

5. The Board shall have such powers as are necessary for the proper performance of the foregoing functions in administering the Plan, including the following:

(a) To prepare and distribute, in such manner as the Board determines to be appropriate, information explaining the Plan;

(b) To obtain from the Company, from the Union, and from the Employees such information as shall be necessary for proper administration of the Plan;

(c) To collect, evaluate, analyze and prepare statistical and other data with respect to its administration of the Plan;

(d) To obtain, for information purposes only, a copy of the actuarial reports prepared by the Actuary, which reports shall include a tabular summary of the employee data on which they are based, and a copy of the annual report of the Trustee;

(e) To prescribe rules and regulations for performance of its functions in administering the Plan; and

(f) To cause benefit payments to be made to another person for the benefit of any Retired Employee whom the Board shall find is unable to care for his affairs because of illness or accident, or is otherwise mentally or physically incompetent and unable to give a valid receipt (unless prior claim therefor shall have been made by duly qualified guardian or other legal representative), without responsibility on the part of the Board or the Trustee to follow the application of any such payment; and any such payment shall operate as a complete discharge of all liability therefor under this Plan and of the Fund.

6. The Board and any member thereof shall be entitled to rely upon the correctness of any information furnished by the Trustee, the Union, or the Company. Neither the Board nor any of its members, nor the Union, nor any officer or any other representative of the Union, nor the Company nor any officer or any other representative of the Company shall be liable because of any act or failure to act on the part of the Board, or any of its members, to any person whatsoever, except that nothing herein shall be deemed to relieve any such individual from liability for his own fraud or bad faith.

7. Neither the Board nor the Impartial Chairman shall have any power to add to or subtract from, or modify, any of the

terms of this Plan, or to change or add to any benefit provided by this Plan, or to waive or fail to apply any requirement of eligibility for a benefit under this Plan. Nothing contained herein shall be deemed to give the Board power to prescribe in any manner, internal procedures or operations of either the Union or the Company.

8. No ruling or decision of the Board in any one case shall create a basis for an adjustment in any other case, but, in making any ruling or decision, the Board shall act in such a way as not to discriminate in favor of or against any class or classes of Employees.

9. The Board shall decide all questions in accordance with the terms of the Plan and all decisions of the Board in accordance therewith shall be final and binding upon the Company, the Union, the employees and all claimants under the Plan.

ARTICLE IV CONTRIBUTIONS

1. Promptly after the Company shall have received the favorable determination or ruling letter of the Internal Revenue Service referred to in Article I hereof, or at such earlier date as the Company may determine, the Company shall establish the Fund by executing and delivering the Trust Agreement, and by making an initial payment into the Fund of not less than One Thousand Dollars (\$1,000.00). During the first Plan Year, the Company shall pay into the Fund such additional amounts as shall be necessary to pay the benefits, if any, to which Retired Employees are entitled hereunder during the first Plan Year.

2. The Company agrees to contribute to the Fund as its obligation hereunder for each Plan Year an amount as determined by the Actuary equal to the least of the following amounts:

- (a) **The sum of the following:**

(1) The normal costs of providing the benefits under the Plan;

(2) The portion attributable to such Plan Year of the amount required to fund in full on a level basis over a 30-year period the accrued liability on the Effective Date; plus

(3) The estimated amount necessary to cover such administrative costs as are payable from the Fund for such Plan Year;

or

(b) The maximum amount that is deductible for Federal Income Tax purposes for the taxable year of the Company ending with or within such Plan Year.

3. Such contributions shall be paid to the Trustee, not later than sixty (60) days after the close of each Plan Year. The amount required to be contributed by the Company hereunder for the initial Plan Year under Section 2 of this Article shall be reduced by the amount contributed for such Year under Section 1 of this Article.

4. The Company may make, from time to time, such additional payments to the Fund as it, in its sole discretion, deems advisable. Such additional payments shall be credited against the contributions the Company is required to make in accordance with Section 2 of this Article.

5. Payments by the Company to the Trustee of the contributions determined under Sections 1 and 2 of this Article shall be in complete discharge of the Company's financial obligation under this Plan. The Company will cause the Board to be furnished with a certificate of the Actuary at least annually, as to compliance with the funding requirements contained herein.

6. No Employee shall make or be required to make any contributions to the Fund.

ARTICLE V
THE FUND AND THE TRUSTEE

1. The Company shall select a Trustee to hold and invest the Fund in accordance with the terms of the Trust Agreement, which shall be in such form and contain such provisions as the Company shall determine, subject as hereinafter provided. The Company may from time to time modify the terms and provisions of the Trust Agreement and may remove any Trustee and select a successor Trustee, provided that any such Trustee shall be a bank or trust company incorporated under the laws of the United States or of any state and qualified to conduct business as a trustee. The Trust Agreement shall provide that the Trustee shall have the sole discretion as to the investment and re-investment of the Fund. The Trustee may invest in any common trust fund or funds maintained by the Trustee.

2. The Fund may be combined, for investment purposes with other retirement funds maintained by the Company, and, in such event, the provisions of the Trust Agreement may be made applicable not only to the Fund but to such other funds as well, but, in the event of any such combination, separate accounting of the Fund shall be maintained to the end that such combination shall not result in the use of the Fund other than for the purposes set forth in this Plan.

3. The Fund shall be utilized for the payment of the benefits provided for herein and for payment of the Trustee's fees, expenses of administration, fees and expenses of the Actuary and fees and expenses of examining physicians or clinics to the extent not paid directly by the Company. Benefits provided for herein shall be only such benefits as can be provided by the assets of the fund. In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.

4. No part of the principal or income of the Fund shall in any event be used for or diverted to purposes other than those provided for in this Plan; provided that any balance remaining in the Fund, because of variations between actual and expected actuarial requirements, after the satisfaction of all direct and contingent liabilities for benefits and expenses herein set forth, shall be paid to the Company

ARTICLE VI
CREDITING SERVICE

1. An Employee who retires under the Plan after the Effective Date shall be entitled to Past Service Credits on the basis of total Seniority which he holds with the Company on the Effective Date, provided that no Past Service Credits shall be earned for any period after an employee's 68th birthday. Past Service Credits shall be computed to the nearest one-tenth year.

2. An Employee who retires under the Plan after the Effective Date shall be entitled to Future Service Credits for the service performed for the Company after the Effective Date on the following basis:

(a) An Employee shall be entitled to one (1) year of Future Service Credit for each Plan Year for which he has obtained 1,700 or more Creditable Hours (as hereinafter defined). An Employee having less than 1,700 Creditable Hours in any Plan Year shall be entitled to one-tenth of one (1) year of Future Service Credit for each 170 Creditable Hours, or major fraction thereof, he has obtained during such year.

(b) The following hours occurring prior to the attainment of age 68 by an Employee shall be creditable hours for purposes hereof;

(i) All hours for which an Employee receives pay from the Company, hours paid at premium rate being counted as straight-time hours;

(ii) All hours (not in excess of forty (40) hours per week) during any of the following periods of absence from work when an Employee normally would have been scheduled to work for the Company, but not including any period of time an Employee is entitled to receive benefits hereunder;

(a) Absence because of injury or disease sustained in the course of employment with the Company, and with respect to which Workmen's Compensation benefits are received by the Employee;

(b) Absence pursuant to leave of absence granted for personal illness or injury occurring during the period sickness or accident benefits are payable under the provisions of the group insurance plan of the Company as now in effect or as hereafter amended (or occurring during the period such benefits otherwise would have been payable if the Employee had not exhausted his benefit rights thereunder); in the event such leave of absence shall have been granted pursuant to the provisions of the Collective Bargaining Agreement;

(c) Absence pursuant to leave of absence granted for Local Union business, in the event such leave of absence shall have been granted pursuant to the provisions of the Collective Bargaining Agreement;

(d) Absence caused by reason of service in the Armed Forces of the United States in the event that the absent Employee had Seniority at the time of the commencement of such absence, retains re-employment rights with the Company under the provisions of law or the Collective Bargaining Agreement, and returns to work for the Company during the period he retains such re-employment rights (or reports to the Company, under such circumstances, and is given leave of absence or laid-off status), provided that no Creditable

Hours shall be earned except during the actual period of service in the Armed Forces.

3. An Employee shall lose his Credited Service in the event his employment and seniority with the Company are terminated in accordance with the provisions of the applicable Collective Bargaining Agreement; provided, however, that if such Employee is otherwise eligible for benefits under the Plan on the date of such termination, his Credited Service on such date shall be used in the determination of his benefit rights. If a Retired Employee is re-employed by the company, the Credited Service which he had at the time of previous retirement shall be reinstated for purposes of this Plan, provided that at such time of re-employment he is an "Employee." If an Employee who has accumulated Credited Service within the Bargaining Unit, and who has left the Bargaining Unit without leaving the employ of the Company, returns to the Bargaining Unit with reinstatement of seniority, the Credited Service which such Employee had at the time he left the Bargaining Unit shall be reinstated for the purposes of this Plan. If a Retired Employee who has been receiving Disability Retirement Benefits under the Plan recovers from his disability to such degree that he is no longer deemed permanently and totally disabled and he returns to work in the Bargaining Unit, the Credited Service which he had at time of previous disability retirement shall be reinstated for purposes of this Plan.

4. Any former Employee who loses his Credited Service under Section 3 above, and is later re-employed by the Company shall, upon making proper application, have such Credited Service reinstated provided such person is re-employed within thirty-six (36) consecutive months following the last day such person worked for the Company prior to the loss of Credited Service.

ARTICLE VII
ELIGIBILITY FOR BENEFITS

1. Only Employees whose employment with the Company shall have terminated after the Effective Date shall be eligible for benefits. The requirements for eligibility for benefits under this Plan are as follows:

(a) *For Normal Retirement Benefit*—An Employee with ten (10) years or more of Credited Service, whose employment with the Company shall have terminated on or after he attains the age of 65 years, shall be eligible for a Normal Retirement Benefit.

(b) *For Early Retirement Benefit*—An Employee with ten (10) years or more of Credited Service, whose employment with the Company shall have terminated on or after he attains the age of 60 years, but prior to attainment of age 65, shall be eligible, at his option, for either a Deferred Early Retirement Benefit or an Immediate Early Retirement Benefit.

(c) *For Disability Retirement Benefit*—An Employee with fifteen (15) years or more of Credited Service in respect of whom the Board shall have made a finding of Permanent and Total Disability, and whose active employment with the Company shall have ceased by reason of such disability prior to attainment of age 65, shall be eligible for Disability Retirement Benefit.

(d) *For Vested Deferred Retirement Benefit*—An Employee with fifteen (15) years or more of Credited Service, whose employment with the Company shall have terminated, on or after he attains the age of 45 years, but prior to the attainment of age 60, shall be eligible for a Vested Deferred Retirement Benefit.

2. Benefits shall become payable at the times and for the periods hereinafter set forth in Article VIII.

ARTICLE VIII
COMMENCEMENT AND DURATION OF BENEFITS

1. Normal Retirement Benefit, Immediate Early Retirement Benefit or Deferred Early Retirement shall become payable to a Retired Employee (if he shall then be living) on the first day of the first month after (a) his employment with the Company shall have terminated, (b) he shall have filed an application for such benefit with the Board, and (c) (in case of a Retired Employee eligible to receive a Deferred Early Retirement Benefit) he shall have attained the age of 65 years; and shall be payable on the first day of each month thereafter during his lifetime so long as he remains a Retired Employee.

2. Vested Deferred Retirement Benefit shall become payable to a Retired Employee (if he shall then be living) on the first day of the first month after (a) he has attained the age of 65 years, and (b) he shall have filed an application for such benefit with the Board, which application shall have been filed not earlier than 60 days prior to his 65th birthday and not later than his 70th birthday, and shall be payable on the first day of each month thereafter so long as he remains a Retired Employee.

3. Disability Retirement Benefit shall become payable and shall continue to be payable under the following circumstances:

(a) Disability Retirement Benefit shall become payable to a Retired Employee (if he shall then be living) on the first day of the first month after (i) his active employment with the Company shall have ceased because of Permanent and Total Disability, (ii) he shall have filed application for such benefit with the Board, (iii) he shall have ceased to be eligible to receive weekly sickness or accident benefits under the Company's Group Insurance Plan, and (iv) the Board shall have made a finding with respect to such person of Permanent and Total Disability based upon medical evidence resulting from an examination made by a diagnostic

medical clinic or one or more physicians (either being qualified in the field of psychiatric diagnosis, in the event a mental condition is made the basis of a claim for Disability Retirement Benefit). Such benefit shall continue to be payable to such Retired Employee until terminated as herein-after provided.

(b) A Disability Retirement Benefit shall be terminated on the first to occur of the following events:

(i) the Retired Employee shall have engaged in any gainful occupation or employment, except for purposes of rehabilitation approved by the Board;

(ii) the Board shall have determined, on the basis of a medical examination, that the Retired Employee no longer has a Permanent and Total Disability;

(iii) the Retired Employee shall have refused to submit to a medical examination ordered by the Board, provided that he shall not be required to submit to a medical examination more often than twice in any 12-month period;

(iv) The Retired Employee shall become eligible for an "Old Age Insurance Benefit" under the Federal Social Security Act as in effect on the date hereof or as hereafter amended.

(c) In the event that Disability Retirement Benefit is terminated for the reason set forth in sub-paragraph (b) (iv) of this Section 3, a Normal Retirement Benefit based on the Retired Employee's Credited Service to the date of his disability retirement shall become payable to him commencing on the first day of the first month after such termination (if he shall then be living), and shall be payable on the first day of each month thereafter during his lifetime, so long as he remains a Retired Employee.

(d) In the event that a Disability Retirement Benefit is terminated for reasons set forth in sub-paragraph (b) (i), (ii),

or (iii) of this Section 3, a Vested Deferred Retirement Benefit shall become payable under the conditions set forth in Section 2 of this Article VIII, provided that the Retired Employee shall have otherwise been eligible for such Vested Deferred Retirement Benefit at the time of the commencement of his Permanent and Total Disability.

ARTICLE IX AMENDMENT OF THE PLAN

1. The Company and the Union agree to make such modifications, alterations, or amendments to this Agreement and Plan, and the Company agrees to make such amendments to the Trust Agreement as may be necessary—

(a) to establish and maintain the status of the trust created under the Trust Agreement as a qualified pension trust and the deductibility for income tax purposes of Company contributions thereto under the provisions of Sections 501, 401 and 404 or other applicable provisions of the Internal Revenue Code of 1954 or other Federal tax legislation, as now in effect or hereafter enacted, and the Regulations issued thereunder, all as evidenced by a favorable ruling or determination letter or letters of the Internal Revenue Service, and

(b) to comply with any Federal or State laws or regulations promulgated thereunder;

provided no such modification, alteration or amendment shall be required that would, in any manner, change the amount of the contributions to be made hereunder by the Company. This Agreement and Plan otherwise may be amended at any time and from time to time by mutual agreement of the Company and the Union. Any modification, alteration or amendment of the Plan or the Trust Agreement made in accordance with this Section 1, may be made retroactively, if necessary or appropriate.

2. Except as provided in Section 1 of this Article, neither the Company nor the Union shall demand any change in this

Agreement and Plan to be effective before October 31, 1961, nor, prior to August 31, 1961, shall either party be required to bargain or negotiate with respect to pensions, retirement benefits or disability benefits, or with respect to any amendment to this Agreement and Plan. No demand or request for any change or amendment in this Agreement and Plan shall be an objective of, or be stated as reasons for, any strike or lockout or other exercise of economic force or threat either by the Union or by the Company prior to the end of the term of the Collective Bargaining Agreement.

3. In the event that either the Company or the Union desires to negotiate with respect to a modification of this Agreement and Plan, to be effective not earlier than October 31, 1961, it shall give the other party at least 60 days prior written notice thereof. Negotiations shall commence on the 60th day after the serving of such notice or on August 31, 1961, whichever date is later, provided that negotiations may commence earlier by mutual agreement of the parties. During the period of any such negotiations, this Agreement and Plan shall remain in effect.

ARTICLE X TERMINATION OF THE PLAN

1. This Plan is intended to be a permanent plan, provided that either party reserves the right to terminate this Agreement and Plan as hereinafter provided.

2. In the event that either party desires to terminate this Agreement and Plan, it shall give the other party 90 days prior written notice thereof, which notice may be served at any time during the negotiations referred to in Section 3, of Article IX, or at any time after August 31, 1961, whichever time is earlier. On the 90th day after the serving of the notice specified in this Section, this Plan and Agreement shall terminate.

3. In the event of termination of the Plan, the assets then remaining in the Fund, after providing the accrued and antici-

pated expenses of the Plan and Fund, (including without limitation, expenses of terminating the Plan), shall be allocated by the Board on the basis of present actuarial values to the extent that they shall be sufficient, for the purposes of paying retirement benefits (the amount of which shall be computed on the basis of Credited Service to the date of termination of the Plan) in the following order of precedence:

- (a) To provide their retirement benefits to persons who shall have been Retired Employees and entitled to current benefits under the Plan prior to its termination, without reference to the order of retirement;
- (b) To provide Normal Retirement Benefits to Employees aged 65 or over on the date of termination of the Plan, without reference to the order in which they shall have reached age 65;
- (c) To provide Disability Retirement Benefits to Employees who shall have applied for such benefits prior to the date of termination of the Plan and who are determined to have been eligible for such benefits under provisions of the Plan prior to such date of termination, without reference to the order in which they filed application or met eligibility requirements;
- (d) To provide Normal Retirement Benefits at age 65 to Employees aged 60 or over but less than 65 on the date of termination of the Plan, without reference to the order in which they shall reach age 65;
- (e) To provide Normal Retirement Benefits at age 65 to Employees aged 50 or over but less than 60 on the date of termination of the Plan, without reference to the order in which they shall reach age 65;
- (f) To provide Normal Retirement Benefits at age 65 to Employees below the age of 50 on the date of termination of the Plan, without reference to the order in which they shall reach age 65.

If, after having made provision in the above order of precedence for some but not all of the above categories, the assets then remaining in the Fund are not sufficient to provide completely for the benefits for Employees in the next category, such benefits shall be provided for each such Employee on a pro-rata basis.

4. In making the allocations under Section 3, (b) (d) (e) and (f) of this Article, only actual Credited Service shall be used in determining amounts of benefits, but there shall be no minimum Credited Service requirement of Employees for eligibility for Normal Retirement Benefit.

5. Former Employees who, on termination of employment, were entitled to a Vested Deferred Retirement Benefit hereunder and who, on the date of termination of the Plan, had not yet commenced to receive such Benefit, shall be included within the respective age categories set forth in sub-sections (b), (d), (e) and (f) of Section 3 of this Article for the purposes of the allocation provided for herein; provided, however, that in each category Employees shall be given precedence over such former Employees.

6. Such allocation shall be accomplished through either (i) continuance of the Fund, (ii) creation of a new fund or a pooled fund, or (iii) purchase of annuity contracts. However, the Board upon finding that it is not practicable or desirable under the circumstances to do any of the foregoing with respect to the lowest priority group that has assets allocated to it, (and then only when such assets are insufficient to meet fifty per cent of the liabilities of such priority group), may, with the unanimous consent of all its members, provide for allocation of all of the assets allocated to such priority group as lump sum cash payments in proportion to years of Credited Service to the date of termination of the Plan.

7. Notwithstanding any other provisions of the Plan, for the purposes of this Article, no employee shall cease to be an

employee merely as a direct result of circumstances leading up to the termination of the Plan.

ARTICLE XI MISCELLANEOUS

1. No benefit payable at any time under this Plan shall be subject in any manner to alienation, sale, transfer, assignment, pledge, attachment, garnishment, or encumbrance of any kind. Any attempt to alienate, sell, transfer, assign, pledge or otherwise encumber any such benefit, whether presently or thereafter payable, shall be void. Neither the Fund nor any such benefit shall in any manner be liable for or subject to the debts or liability of any Employee, Retired Employee or former Employee entitled to or receiving any benefit hereunder. If a Retired Employee shall attempt to, or shall, alienate, sell, transfer, assign, pledge, or otherwise encumber his benefit under this Plan or any part thereof, or, if by reason of his bankruptcy, or any other event such benefit would devolve upon anyone else or would not be enjoyed by him, then the Board, in its discretion, may terminate the Retired Employee's interest in any such benefit and hold or apply it to, or for the benefit of, his spouse, children, or other dependents, or any of them, in such manner as the Board may deem proper; and any such payment shall be a complete discharge protanto of all liability of the Board and the Fund to such Retired Employee under this Plan.

2. Each Retired Employee shall be responsible for furnishing the Board with the address to which he wishes his benefit checks mailed. If, after the commencement of the payments of benefits hereunder to any Retired Employee, or after termination of the Plan, the Board is unable after reasonable search to locate any such Retired Employee or is unable to locate a former Employee entitled to benefits hereunder, it shall mail by registered or certified mail, postage prepaid, to the last known address of such person, a notice to the effect that such person is entitled to receive benefits hereunder, and (a) if such

notice is returned by the Post Office as being undeliverable because the addressee cannot be located at the address indicated, and if neither the Company, the Trustee nor the Board shall obtain any knowledge of such person's whereabouts within the two years from the date such notice is mailed (one (1) year, in the event such notice is mailed after termination of the Plan), or (b) if within such two (2), or one (1) year period, as the case may be, there is no response to such notice, informing the Board of such person's whereabouts, then, in either of such events, at the end of the applicable two (2), or one (1) year period, the rights of any such person to benefits hereunder shall be forfeited. In the event any such forfeiture occurs after the termination of the Plan with respect to a person in a category for which there were insufficient assets of the Fund to make full allocation as provided in Article X, then the amounts so forfeited shall be reallocated pro rata to the other persons in such category, to the extent available to make allocations up to the full amounts of the allocations to such persons as provided in Article X.

3. The Company's right to discipline or to discharge Employees shall not be affected by reason of any of the provisions of this Plan. Nothing in this Plan shall be construed as giving any Employee any right to be retained at work or in the employ of the Company.

4. No Employee shall have any vested right under this Plan except to the extent that he may be entitled (a) to Vested Deferred Retirement Benefit, or (b) benefits payable upon retirement, all as herein provided.

5. In determining whether a Retired Employee shall have become eligible for "Old Age Insurance Benefit" or "Disability Insurance Benefit" under the Social Security Act, or corresponding benefit for any purpose hereof, such Retired Employee shall be considered as being eligible for such benefit regardless of the fact that he does not actually receive such benefit, or once having received such benefit subse-

quently becomes disqualified therefor, in either event, by failure to make proper application therefor, entering into covered employment, or any other act or failure to act on his part.

6. Notwithstanding anything herein contained to the contrary, in the event monthly benefits payable hereunder to any Retired Employee shall be an amount less than Ten Dollars (\$10.00), the Board may authorize payments to be made quarterly in lieu of monthly, and in the event such quarterly payments would be in an amount less than Ten Dollars (\$10.00), the Board may authorize payments to be made annually.

7. The use of gender references herein is merely for convenience and shall have no legal effect.

8. Any notice or other thing required or desired to be served, made or delivered hereunder shall be in writing and shall be deemed validly served, made or delivered upon the deposit thereof in the United States registered or certified mail, postage prepaid, and addressed to the party to be notified as follows:

The Company: Fred A. Nachman, Jr.
4560 West Armitage Avenue
Chicago, Illinois.

The Union: Robert Johnston
54 West Randolph Street
Chicago, Illinois.

IN WITNESS WHEREOF the parties have caused this Agreement and Plan to be executed the day and year first above written.

INTERNATIONAL UNION,
UNITED AUTOMOBILE,
AIRCRAFT AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
AFFILIATED WITH AFL-CIO
AND ITS LOCAL 1003

NACHMAN
CORPORATION

NACHMAN CORPORATION (CHICAGO PLANT)

AMENDMENT NO. 1

TO

AGREEMENT AND PENSION PLAN (UAW)

Dated February 29, 1960

By instrument, dated February 29, 1960, entered into by and between NACHMAN CORPORATION, an Illinois corporation (therein and hereinafter called the "Company"), and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) affiliated with AFL-CIO, and its Local 1003 (therein and hereinafter called the "Union"), the Nachman Corporation (Chicago Plant)—UAW Pension Plan (herein called the "Plan") was established. The Plan provides in Article IX thereof that it may be amended at any time and from time to time by mutual agreement of the Company and the Union. The Company and the Union have mutually agreed to amend the Plan in the respects hereinafter stated.

Accordingly, the Plan is hereby amended in the following respects:

FIRST

Article II of the Plan is hereby amended by—

(a) Deleting the definition of "Collective Bargaining Agreement" contained therein and inserting in lieu thereof the following:

"*Collective Bargaining Agreement*—The Collective Bargaining Agreement, dated November 1, 1963, entered into by and between the Company and the Union.";

(b) Adding the following sentence to the definition of "Disability Retirement Benefit":

"Notwithstanding the foregoing, the words and figures 'One Dollar and Eight-nine Cents (\$1.89)' and 'Fifty-six Dollars and Seventy Cents (\$56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to a Retired Employee eligible to receive a Disability Retirement Benefit, whose retirement for Permanent and Total Disability shall have occurred after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents (\$2.17)' and 'Sixty-Five Dollars and Ten Cents (\$65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to a Retired Employee eligible to receive a Disability Retirement Benefit, whose retirement for Permanent and Total Disability shall have occurred after November 1, 1965.";

(c) Adding the following sentence to the definition of "Normal Retirement Benefit":

"Notwithstanding the foregoing, the words and figures 'One Dollar and Eight-nine Cents (\$1.89)' and 'Fifty-six Dollars and Seventy Cents (\$56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to a person who shall have become a Retired Employee after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents (\$2.17)' and 'Sixty-five Dollars and Ten Cents (\$65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to a person who shall have become a Retired Employee after November 1, 1965.";

and

(d) Adding the following sentence to the definition of "Vested Deferred Retirement Benefit":

"Notwithstanding the foregoing, the words and figures 'One Dollar and Eight-nine Cents (\$1.89)', and 'Fifty-six

Dollars and Seventy Cents (\$56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents (\$2.17)' and 'Sixty-five Dollars and Ten Cents (\$65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1965.'.

SECOND

Article IV of the Plan is hereby amended by deleting Paragraph 2(a)(2) thereof and inserting in lieu thereof the following:

"(2) The portion attributable to such Plan Year of the amount required to fund in full on a level basis over a 30-year period commencing on the Effective Date the initial unfunded accrued liability, plus the portion attributable to such Plan Year of the amount required to fund in full on a level basis over a 30-year period commencing on the effective date of any amendment to the Plan any additional unfunded accrued liability arising from increased benefits pursuant to such amendment; plus".

THIRD

Article IX of the Plan is hereby amended by—

(a) Changing the words and figures "October 31, 1961" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "October 31, 1966";

and

(b) Changing the words and figures "August 31, 1961" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "August 31, 1966".

FOURTH

Article X of the Plan is hereby amended by changing the words and figures "August 31, 1961" where they appear in Paragraph 2 thereof to the words and figures "August 31, 1966".

Except as changed, modified and amended hereby, all of the terms and provisions of the Plan shall be and remain in full force and effect.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed, this — day of _____, 1965, as of November 1, 1964.

INTERNATIONAL UNION,
UNITED AUTOMOBILE,
AIRCRAFT AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
AFFILIATED WITH AFL-CIO
AND ITS LOCAL 1003

NACHMAN
CORPORATION

NACHMAN CORPORATION (CHICAGO PLANT)

AMENDMENT NO. 2

TO

AGREEMENT AND PENSION PLAN (UAW)
Dated February 29, 1960

By instrument, dated February 29, 1960, entered into by and between NACHMAN CORPORATION, an Illinois corporation (therein and hereinafter called the "Company"), and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT

BILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) affiliated with AFL-CIO, and its Local 1003 (therein and hereinafter called the "Union"), the Nachman Corporation (Chicago Plant)—UAW Pension Plan (herein called the "Plan") was established. The Plan provides in Article IX thereof that it may be amended at any time and from time to time by mutual agreement of the Company and the Union. The Plan was previously amended by agreement dated August 16, 1965 as of November 1, 1964 and entitled "Amendment No. 1 To Agreement and Pension Plan (UAW) Dated February 29, 1960" (herein called "Amendment No. 1"). The Company and the Union have mutually agreed to further amend the Plan in the respects hereinafter stated.

Accordingly, the Plan is hereby amended in the following respects:

FIRST

Article II of the Plan is hereby amended by—

(a) Deleting the definition of "Collective Bargaining Agreement" contained therein as amended by Amendment No. 1 and inserting in lieu thereof the following:

"Collective Bargaining Agreement—The Collective Bargaining Agreement, dated November 1, 1970, entered into by and between the Company and the Union."

(b) Deleting the last sentence of the definition of "Disability Retirement Benefit" contained therein (as added by Amendment No. 1) and inserting in lieu thereof the following:

"Notwithstanding the foregoing, the words and figures 'One Dollar and Eighty-nine Cents (\$1.89)' and 'Fifty-six Dollars and Seventy Cents (\$56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to a Retired Employee eligible to receive a Disability Retirement Benefit, whose retirement for Permanent and Total Dis-

ability shall have occurred after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents (\$2.17)' and 'Sixty-five Dollars and Ten Cents (\$65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to a Retired Employee eligible to receive a Disability Retirement Benefit, whose retirement for Permanent and Total Disability shall have occurred after November 1, 1965 and before November 2, 1970, and the words and figures 'Two Dollars and Forty-five Cents (\$2.45)' and 'Seventy-three Dollars and Fifty Cents (\$73.50)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to a Retired Employee eligible to receive a Disability Retirement Benefit whose retirement for Permanent and Total Disability shall have occurred after November 1, 1970 and before November 2, 1971, and the words and figures 'Two Dollars and Eighty-seven Cents (\$2.87)' and 'Eighty-six Dollars and Ten Cents (\$86.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence with respect to a Retired Employee eligible to receive a Disability Retirement Benefit, whose retirement for Permanent and Total Disability shall have occurred after November 1, 1971.";

(c) Deleting the last sentence of the definition of "Normal Retirement Benefit" contained therein (as added by Amendment No. 1) and inserting in lieu thereof the following:

"Notwithstanding the foregoing, the words and figures 'One Dollar and Eighty-nine Cents (\$1.89)' and 'Fifty-six Dollars and Seventy Cents (\$56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to a person who shall have become a Retired Employee after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents (\$2.17)'

and 'Sixty-five Dollars and Ten Cents (\$65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to a person who shall have become a Retired Employee after November 1, 1965 and before November 2, 1970, and the words and figures 'Two Dollars and Forty-five Cents (\$2.45)' and 'Seventy-three Dollars and Fifty Cents (\$73.50)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to a person who shall have become a Retired Employee after November 1, 1970 and before November 2, 1971, and the words and figures 'Two Dollars and Eighty-seven Cents (\$2.87)' and 'Eighty-six Dollars and Ten Cents (\$86.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence with respect to a person who shall have become a Retired Employee after November 1, 1971.';

and

(d) Deleting the last sentence of the definition of "Vested Deferred Retirement Benefit" contained therein (as added by Amendment No. 1) and inserting in lieu thereof the following:

"Notwithstanding the foregoing, the words and figures 'One Dollar and Eighty-nine Cents (\$1.89)' and 'Fifty-six Dollars and Seventy Cents (\$56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents (\$2.17)' and 'Sixty-five Dollars and Ten Cents (\$65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to any

such former Employee whose employment with the Company shall have been terminated after November 1, 1965 and before November 2, 1970, and the words and figures 'Two Dollars and Forty-five Cents (\$2.45)' and 'Seventy-three Dollars and Fifty Cents (\$73.50)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence, with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1970 and before November 2, 1971, and the words and figures 'Two Dollars and Eighty-seven Cents (\$2.87)' and 'Eighty-six Dollars and Ten Cents (\$86.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents (\$1.60)' and 'Forty-eight Dollars (\$48.00)', respectively, in the next preceding sentence with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1971."

SECOND

Article IX of the Plan as amended by Amendment No. 1 is hereby further amended by—

(a) Changing the words and figures "October 31, 1966" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "October 31, 1972";

and

(b) Changing the words and figures "August 31, 1966" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "August 31, 1972."

THIRD

Article X of the Plan as amended by Amendment No. 1 is hereby further amended by changing the words and figures "August 31, 1966" where they appear in Paragraph 2 thereof to the words and figures "August 31, 1972."

Except as changed, modified and amended hereby, all of the terms and provisions of the Plan shall be and remain in full force and effect.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed this 14th day of June, 1971, as of November 1, 1970.

INTERNATIONAL UNION,
UNITED AUTOMOBILE,
AIRCRAFT AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
AFFILIATED WITH AFL-CIO
AND ITS LOCAL 1003

NACHMAN
CORPORATION

NACHMAN CORPORATION (CHICAGO PLANT)

AMENDMENT NO. 3

TO

AGREEMENT AND PENSION PLAN (UAW)
Dated February 29, 1960

By instrument, dated February 29, 1960, entered into by and between NACHMAN CORPORATION, an Illinois corporation (therein and hereinafter called the "Company"), and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) affiliated with AFL-CIO, and its Local 1003 (therein and hereinafter called the "Union"), the Nachman Corporation (Chicago Plant)—UAW Pension Plan (herein called the "Plan") was established. The Plan provides in Article IX thereof that it may be amended at any time and from time to time by mutual agreement of the Company and the Union. The Plan was previously amended by agreement dated August 16, 1965 as of November 1, 1964 and entitled "Amendment No. 1 to Agreement and Pension Plan (UAW) Dated February 29, 1960" (herein called "Amendment No. 1"), and June 14, 1971 as of November 1, 1970 and entitled "Amendment No. 2 To Agreement and

1970 and entitled "Amendment No. 2 To Agreement and Pension Plan (UAW) Dated February 29, 1960" (herein called Amendment No. 2"). The Company and the Union have mutually agreed to further amend the Plan in the respects hereinafter stated.

Accordingly, the Plan is hereby amended in the following respects:

FIRST

Article II of the Plan is hereby amended by—

(a) Deleting the definition of "Collective Bargaining Agreement" contained therein as amended by Amendment No. 2 and inserting in lieu thereof the following:

"Collective Bargaining Agreement"

The Collective Bargaining Agreement, dated February 12, 1973 (effective November 1, 1972) entered into by and between the Company and the Union.'";

(b) Deleting the definition of "Disability Retirement Benefit" contained therein as amended by Amendment No. 2 and inserting in lieu thereof the following:

"An amount payable monthly to a Retired Employee eligible to receive a Disability Retirement Benefit hereunder equal to:

(i) if such Retired Employee is not eligible for Disability Insurance Benefits under the Social Security Act, Eighty Dollars (\$80.00); or

(ii) if such Retired Employee is eligible for Disability Benefits under the Social Security Act:

(A) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred before November 2, 1964, One Dollar and Sixty Cents (\$1.60) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Forty-eight Dollars (\$48.00);

- (B) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred after November 1, 1964, and before November 2, 1965, One Dollar and Eighty-Nine Cents (\$1.89) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Fifty-Six Dollars and Seventy Cents (\$56.70);
- (C) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred after November 1, 1965 and before November 2, 1970, Two Dollars and Seventeen Cents (\$2.17) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Sixty-five Dollars and Ten Cents (\$65.10);
- (D) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred after November 1, 1970 and before November 2, 1971, Two Dollars and Forty-five Cents (\$2.45) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Seventy-three Dollars and Fifty Cents (\$73.50);
- (E) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred after November 1, 1971 and before November 2, 1972, Two Dollars and Eighty-seven Cents (\$2.87) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Eighty-six Dollars and Ten Cents (\$86.10);
- (F) and such Retired Employee's retirement for Permanent and Total Disability shall have

occurred after November 1, 1972 and before November 2, 1973, Three Dollars and Twenty-five Cents (\$3.25) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Ninety-seven Dollars and Fifty Cents (\$97.50);

- (G) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred after November 1, 1973, Three Dollars and Fity Cents (\$3.50) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed One Hundred and Five Dollars (\$105.00);

reduced in every case by Other Benefits, if any, of such Retired Employee."

(c) Deleting the definition of "Normal Retirement Benefit" contained therein as amended by Amendment No. 2 and inserting in lieu thereof the following:

"An amount payable monthly equal to:

- (i) with respect to a person who shall have become a Retired Employee before November 2, 1964, One Dollar and Sixty Cents (\$1.60) multiplied by such Retired Employee's Credited Service, but not to exceed Forty-eight Dollars (\$48.00);
- (ii) with respect to a person who shall have become a Retired Employee after November 1, 1964 and before November 2, 1965, One Dollar and Eighty-nine Cents (\$1.89) multiplied by such Retired Employee's Credited Service, but not to exceed Fifty-Six Dollars and Seventy Cents (\$56.70);
- (iii) with respect to a person who shall have become a Retired Employee after November 1, 1965 and before November 2, 1970, Two Dollars and Seventeen Cents (\$2.17) multiplied by such Retired

Employee's Credited Service, but not to exceed Sixty-five Dollars and Ten Cents (\$65.10);

- (iv) with respect to a person who shall have become a Retired Employee after November 1, 1970 and before November 2, 1971, Two Dollars and Forty-five Cents (\$2.45) multiplied by such Retired Employee's Credited Service, but not to exceed Seventy-three Dollars and Fifty Cents (\$73.50);
- (v) with respect to a person who shall have become a Retired Employee after November 1, 1971 and before November 2, 1972, Two Dollars and Eighty-seven Cents (\$2.87) multiplied by such Retired Employee's Credited Service, but not to exceed Eighty-six Dollars and Ten Cents (\$86.10);
- (vi) with respect to a person who shall have become a Retired Employee after November 1, 1972 and before November 2, 1973, Three Dollars and Twenty-five Cents (\$3.25) multiplied by such Retired Employee's Credited Service, but not to exceed Ninety-seven Dollars and Fifty Cents (\$97.50);
- (vii) with respect to a person who shall have become a Retired Employee after November 1, 1973, Three Dollars and Fifty Cents (\$3.50) multiplied by such Retired Employee's Credited Service, but not to exceed One Hundred and Five Dollars (\$105.00);

and

(d) Deleting the definition of "Vested Deferred Retirement Benefit" contained therein as amended by Amendment No. 2 and inserting in lieu thereof the following:

"An amount payable monthly equal to:

- (i) with respect to a former Employee whose employment with the Company shall have been terminated before November 2, 1964, One Dollar and Sixty Cents (\$1.60) multiplied by such Retired Employee's Credited Service, but not to exceed Forty-eight Dollars (\$48.00);

- (ii) with respect to a former Employee whose employment with the Company shall have been terminated after November 1, 1964 and before November 2, 1965, One Dollar and Eighty-nine Cents (\$1.89) multiplied by such Retired Employee's Credited Service, but not to exceed Fifty-Six Dollars and Seventy Cents (\$56.70);
- (iii) with respect to a former employee whose employment with the Company shall have been terminated after November 1, 1965 and before November 2, 1970, Two Dollars and Seventeen Cents (\$2.17) multiplied by such Retired Employee's Credited Service, but not to exceed Sixty-five Dollars and Ten Cents (\$65.10);
- (iv) with respect to a former Employee whose employment with the Company shall have been terminated after November 1, 1970 and before November 2, 1971, Two Dollars and Forty-five Cents (\$2.45) multiplied by such Retired Employee's Credited Service, but not to exceed Seventy-three Dollars and Fifty Cents (\$73.50);
- (v) with respect to a Former Employee whose employment with the Company shall have been terminated after November 1, 1971 and before November 2, 1972, Two Dollars and Eighty-seven Cents (\$2.87) multiplied by such Retired Employee's Credited Service, but not to exceed Eighty-six Dollars and Ten Cents (\$86.10);
- (vi) with respect to a former Employee whose employment with the Company shall have been terminated after November 1, 1972 and before November 2, 1973, Three Dollars and Twenty-five Cents (\$3.25) multiplied by such Retired Employee's Credited Service, but not to exceed Ninety-seven Dollars and Fifty Cents (\$97.50);
- (vii) with respect to a former Employee whose employment with the Company shall have been terminated after November 1, 1973, Three Dollars and Fifty Cents (\$3.50) multiplied by such Retired

Employee's Credited Service, but not to exceed One Hundred and Five Dollars (\$105.00); provided such former Employee having been eligible for a Vested Deferred Retirement Benefit has made application therefor at the time and in the manner in Article VIII provided."

SECOND

Article IX of the Plan as amended by Amendment No. 2 is hereby further amended by—

(a) Changing the words and figures "October 31, 1972" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "October 31, 1975." and

(b) Changing the words and figures "August 31, 1972" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "August 31, 1975."

THIRD

Article X of the Plan as amended by Amendment No. 2 is hereby further amended by changing the words and figures "August 31, 1972" where they appear in Paragraph 2 thereof to the words and figures "August 31, 1975."

Except as changed, modified and amended hereby, all of the terms and provisions of the Plan as heretofore amended shall be and remain in full force and effect.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed this 1st day of March, 1973, as of November 1, 1972.

INTERNATIONAL UNION,
UNITED AUTOMOBILE,
AIRCRAFT AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
AFFILIATED WITH AFL-CIO
AND ITS LOCAL 1003

NACHMAN
CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 76 C 2963

NACHMAN CORPORATION,

Plaintiff,

vs.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant.

MEMORANDUM OPINION

[Filed March 24, 1977]

MOTION TO DISMISS

I.

Plaintiff Nachman Corporation ("Nachman"), brought this action against the Pension Benefit Guaranty Corporation ("PBGC"), challenging the PBGC's interpretation of certain provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA" or "the Act"), and certain regulations issued by the PBGC based upon its interpretation of the Act.

Nachman seeks a declaratory judgment that it is not liable under §4062 of the Act, 29 U.S.C. §1362 for insufficiencies in funding resulting from its December 31, 1975 termination of the Nachman Corporation (Chicago Plant) Agreement and Pension Plan, as amended, ("the Pension Plan"), originally created in 1960 pursuant to a collective bargaining agreement between Nachman and the United Automobile, Aircraft and Agricultural Implement Workers of America ("the UAW"), and an order enjoining the PBGC from issuing a notice under

§4041(c) of the Act, 29 U.S.C. §1341(c), to the effect that the PBGC is unable to determine whether the Pension Plan's assets are sufficient to meet the benefits guaranteed under ERISA.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331 and 1349, and 29 U.S.C. §1302(b). Pending before the Court is defendant's motion to dismiss pursuant to Rule 12(b)(6) F.R.Civ.P., for failure to state a claim upon which relief can be granted. For the reasons set forth below, defendant's motion is denied.

In accordance with the collective bargaining agreement between Nachman and UAW, Nachman agreed to establish a pension plan for certain of its hourly rate employees at its Armitage Avenue facility in Chicago. Under the Pension Plan, employee benefits were to become vested after an employee completed 15 years of service and attained age 45. If an employee with vested benefit rights left his employment before reaching age 65, he would have been eligible to receive benefits at age 65 if the plan had sufficient funds available to pay for the benefits. As a result of the Pension Plan's most recent amendments, 90 day advance notice of intent to terminate was required, which notice could be given at any time after August 31, 1975, to be effective contemporaneously with the expiration of the collective bargaining agreement.

Article V, Section 3 of the Pension Plan specifically limited Nachman's general liability for vested benefits pursuant to the plan to "only such benefits as can be provided by the assets of the Fund" created by the Pension Plan, and "[i]n the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions" to supplement the existing funds in the plan.

The complaint alleges that on October 1, 1975, the first date upon which termination notice could be issued in accordance with the collective bargaining agreement, Nachman gave notice that it was terminating the Pension Plan as of Decem-

ber 31, 1975, due to the unprofitable nature of its operations at its Armitage facility.

There appears to be no question that during the term of the plan Nachman complied fully with the bargained-for funding requirements set forth in the Pension Plan, and that but for the newly created benefit provisions of ERISA and the PBGC's interpretations thereunder, Nachman could have properly terminated the Pension Plan in the manner it did with impunity. The controversy herein centers around the nature of the liability imposed by ERISA on employer-sponsors for the funding of "nonforfeitable vested benefits" in plans which were in existence prior to January 1, 1974, and which were terminated prior to January 1, 1976. Plaintiff contends that under the facts of this case Congress never intended to require post-termination funding by an employer-sponsor, since at the time the Pension Plan was terminated the nonforfeitable rights created by ERISA had not yet vested in the individual employees under the Plan. The PBGC maintains, however, that since Title IV of ERISA, which created the PBGC and plan termination insurance, became effective prior to the termination of the Pension Plan, the PBGC has jurisdiction to issue notice pursuant to §4041(c) of the Act, 29 U.S.C. §1341(c), and to proceed in accordance with the provisions of §4042 of the Act, 29 U.S.C. §1342.

II.

In enacting ERISA, Congress sought to extend pension benefit protections to the millions of employees and their dependents whose pension funds had terminated without sufficient assets to satisfy the benefit expectations of its subscribers. The Act sets safeguards for the operation of covered plans and establishes standards for the administration of pension plans in an effort to minimize terminations of pension plans and losses to beneficiaries.

Title I of ERISA was enacted for the protection of employee benefit rights, and includes an expedited vesting provi-

sion which allows pension benefits to become vested prior to an individual's having reached retirement age. Title II amends the Internal Revenue Code insofar as it relates to retirement plans and includes the requirement of minimum funding of pension plans by employer-sponsors. Title III of the Act creates the Joint Pension Task Force, and sets forth the basic administrative requirements of the Act including the imposition of fiduciary responsibility upon trustees of covered pension plans. Title IV creates the PBGC as a corporate body within the Department of Labor, whose function is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants.

§4041(a) of the Act, 29 U.S.C. §1341(a), requires that prior to the termination of covered pension plans, notice of intent to terminate must first be filed by the employer-sponsor with the PBGC. The PBGC is then required to examine the plan and determine whether the plan's assets are sufficient to pay the guaranteed benefits under the Act. Where the assets are found to be sufficient, the plan administrator is then authorized to terminate the plan. §§4041(b) and (d), 29 U.S.C. §§1341(b) and (d). Where, however, the PBGC is unable to determine whether the plan's assets are sufficient to meet the basic benefit obligations, the plan administrator is to be so notified, §4041(c) of the Act, 29 U.S.C. §1341(c), a trustee is to be appointed to handle the termination of the plan, and the guaranteed benefits are to be paid out through both the assets of the plan and PBGC funds. §§4041(c), 4042(b) of the Act, 29 U.S.C. §§1341(c), 1342(b).

The PBGC itself is essentially a government-owned insurance agency charged with supervision over the termination process of covered pension plans, and with guarantying the payment of vested and nonforfeitable benefits to individuals covered by the plans. The financing for the PBGC comes primarily from premium assessments against employer-sponsors of pension plans, which monies are in turn invested by

the PBGC in one of the four revolving funds established by §4005 of the Act, 29 U.S.C. §1305. Additionally, however, and in an effort to foreclose employer-sponsor reliance upon and abuse of PBGC insurance protections, the Act grants the PBGC a limited right of subrogation against employer-sponsors whose pension plans are inadequately funded at the time of termination. §§4062(b) and 4068(a) of the Act, 29 U.S.C. §§1362(b) and 1368(a). See, S. Rep. No. 93-383, 93d Cong. 1st Sess. 87 (1973).

III.

In §2 of the Act, 29 U.S.C. §1001, Congress recognized that "many employees with long years of employment [were] losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." In an effort to remedy that situation, Congress adopted detailed vesting provisions in §§201-211 of the Act, 29 U.S.C. §1051-1061, which provisions were also made applicable to plans already in existence. In order to allow for appropriate adjustments to those plans which were already in existence, however, Congress postponed the effective date of the vesting provisions for existing plans until "plan years beginning after December 31, 1975."

Thus, in the case of Nachman's Pension Plan, since it was in existence prior to and at the time of the passage of ERISA, and was terminated on December 31, 1975, the vesting provisions of ERISA were never applicable to it.

In setting forth the degree of benefits to be insured and guaranteed by the PBGC, Congress provided in §4022(a) of the Act, 29 U.S.C. §1322(a), that: (emphasis added).

the [PBGC] shall guarantee the payment of all nonforfeitable benefits . . . under the terms of a plan . . .

Under the terms of the Nachman Pension Plan, and in accordance with the law prior to ERISA, it was possible for employee rights under a plan to be vested but subject to forfeiture as a result of underfunding. Accordingly, prior to ERISA the degree of non-forfeitability was directly related to the

degree of funding. After ERISA, however, and subject to the effective dates indicated above, benefits became nonforfeitable immediately upon becoming vested; and, in conjunction with the more liberal vesting provisions of ERISA, Congress thereby acted to substantially increase and guarantee the benefits and protections afforded individuals subject to covered plans.

The only definition of "nonforfeitable" found in ERISA appears in §3(19) of the Act, 29 U.S.C. §1002(19), which provides: (emphasis added).

The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, *which is unconditional, and which is legally enforceable against the plan.*

Though we recognize that this definition is contained in and limited to Title I of the Act, the PBGC has not presented any persuasive reasons for not assuming a similar usage of the term "nonforfeitable" in Title IV of the Act, §4022(a), 29 U.S.C. §1322(a). Rather, as urged by Nachman, the term "nonforfeitable" appears to be used in Title IV just as it is used in Title I. We therefore hold that since the vesting provisions of ERISA were not applicable to Nachman's Pension Plan, the benefits which became vested pursuant to the Pension Plan alone were *not* nonforfeitable, and therefore not subject to guarantee by PBGC under §4022(a) of the Act, 29 U.S.C. §1322(a).

PBGC argues, however, that the express language of §4082(a) of the Act, 29 U.S.C. §1382(a) which provides for an effective date of September 2, 1974 for the plan termination and insurance program of Title IV, gives the PBGC a right, in the event of insufficient funding upon pension plan termination, to pursue the remedies provided in Title IV even if the benefit had only become "vested" in accordance with the

terms of the Pension Plan itself though not "nonforfeitable" as defined in §3(19) of the Act, 29 U.S.C. §1002(19). We disagree.

IV.

We note first that, contrary to the PBGC's assertions, a finding that the Nachman Pension Plan is not subject to the notice and subrogation provisions of Title IV of ERISA does not automatically void the first 16 months of the Title IV insurance program, for there certainly are many pension plans that began after September 2, 1974 which are subject to Title IV. Rather, we hold that based upon the particular facts of this case—where the Pension Plan was terminated prior to the date upon which benefits could become "vested" under ERISA—the beneficiaries of the Nachman Pension Plan did not have nonforfeitable interests in the plan. If at all, their vested rights were the result of rights given them under the Pension Plan, which specifically provided in Article V, Section 3 that: (emphasis added).

Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. *In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.*

Under the Pension Plan, though rights to benefits may have become vested, they were specifically made subject to forfeiture in the event of inadequate funding. This was the plan bargained for by Nachman and UAW, and nothing in the Act appears to require the imposition of a more stringent vesting result.

Despite the language in §4082(a) of the Act, 29 U.S.C. §1382(a) which provides for an effective date of September 2, 1974 for Title IV of ERISA, we believe that Congress could very well have intended to extend PBGC insurance coverage to pension plan participants whose rights *had* become fully

vested (i.e. nonforfeitable), without imposing the immediate added burden on an employer-sponsor of guarantying full funding of all ERISA required benefits for those participants whose rights had *not* become fully vested, at least until such time as the vesting standards and minimum funding requirements of Titles I and II became effective.

We find nothing in the legislative history of ERISA which evidences a contrary intent. Rather, the legislative history of, and the effective dates in Title IV, reflect Congress' primary desire to provide insurance protection to individual participants as expeditiously and efficiently as possible. See, e.g., 120 Cong. Rec. S. 15749 (daily ed. Aug. 22, 1974) (Remarks of Senator Javits). Where a participant's rights had not become fully vested, as that term is used in the Act, however, the notice and subrogation provisions of Title IV are simply not applicable.

We note without deciding that consistent with the expressed Congressional goal of providing immediate insurance protection for participants in pension plans, it is possible that in cases such as the one at bar, the insurance protection through the PBGC would be available immediately even though the related funding requirements on the employer-sponsor may not yet be in effect. Though Congress certainly desired stricter control and closer supervision over pension plans, it allowed for grace periods to enable employer-sponsors to re-arrange their plans in conformity with the Act.

V.

We therefore agree with plaintiff that it would be illogical to assume that Congress intended to impose immediate funding requirements on an employer-sponsor at a time when, under the provisions of Titles I and II of ERISA, an employee's rights to those very benefits had not yet vested, and the minimum funding requirements were not yet effective.

Accordingly, we hold that plaintiff has stated a claim upon which relief can be granted, and deny defendant's motion to

dismiss. This disposition makes it unnecessary to address the constitutional issues raised by the parties in their pleadings.

ENTER:

ABRAHAM LINCOLN MAROVITZ
JUDGE

DATED: March 24, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 76 C 2963

NACHMAN CORPORATION,

Plaintiff,

vs.

PENSION BENEFIT GUARANTY CORPORATION
(PBGC),

Defendant.

MEMORANDUM OPINION

[Filed June 9, 1977]

MOTION TO INTERVENE

Pending before the Court is the motion of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), to intervene in this action as a party defendant as a matter of right under Rule 24(a) F.R.Civ.P., or in the alternative, to intervene permissibly pursuant to Rule 24(b) F.R.Civ.P. As required by Rule 24(c) F.R.Civ.P., UAW's motion is accompanied by a responsive pleading which details its asserted grounds for intervention. For the reasons set forth below, UAW's motion is granted, and we will permit its answer to be filed instanter.

Rule 24(a)(2) F.R.Civ.P. creates a threefold test for intervention of right, for instances other than those governed by Rule 24(a)(1) dealing with an unconditional statutory right to intervene. Under the Rule, upon a timely application, any party will be permitted to intervene if: (1) it claims an interest relating to the property or transaction that is the subject of the action, and (2) it is so situated that the disposition of the

action may as a practical matter impair or impede its ability to protect that interest, unless (3) its interest is adequately represented by the existing parties. See, e.g., *Reedsburg Bank v. Apollo*, 508 F.2d 995, 997-998 (7th Cir. 1975); *United States v. Board of School Commissioners*, 466 F.2d 573, 575 (7th Cir. 1972).

In its motion, UAW asserts that it is a party and signatory to the Agreement and Pension Plan which are at the core of this litigation, and that it is the exclusive representative of the employees and retirees of plaintiff, whose past and future pension benefits are at issue in this action. Further, UAW contends that that interest it has in this litigation—as agent for and representative of the plaintiff's past and present employees—may be impaired or impeded should plaintiff prevail in this litigation, and that defendant PBGC may not adequately represent UAW's interests, since a victory by plaintiff would, according to PBGC, exonerate PBGC from any insurance guaranty liability under ERISA.

There appears to be no question that UAW has an "interest" in this litigation as that term is employed in Rule 24, and that if plaintiff is to prevail on the merits of this action, and therefore not required to supply additional funding to the pension plan, the UAW's interest in securing additional pension benefits for its members will be impaired.

The controversy herein, and the principal grounds upon which plaintiff objects to the UAW's intervention, concerns whether PBGC will adequately represent UAW's interests, and whether UAW's motion to intervene was timely. In discussing the standards for the required showing of inadequacy of representation under Rule 24(a), the Supreme Court in *Trbovich v. Mine Workers*, 404 U.S. 528, 538 n.10 (1972), stated:

The requirement of the Rule is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.

While not questioning the abilities of PBGC to defend against plaintiff's claims, UAW contends that the potential conflict of interest between PBGC and UAW is sufficient to meet the "inadequacy of representation" standard of Rule 24(a) as defined by the Court in *Trbovich*. We agree.

At the heart of this litigation lies the question whether plaintiff's pension plan falls within the parameters of ERISA, and whether the minimum funding requirements sought to be imposed on plaintiff and insurance obligations of the PBGC are applicable to the plan. Should plaintiff prevail on the "nonforfeitability" and minimum funding issues, PBGC has asserted that its insurance guarantees would not apply to plaintiff's employees, and that those individuals would be left without a remedy. See, Transcript of Proceedings, March 24, 1977, at p. 5. Thus, despite the fact that PBGC now argues that the subject pension benefits are guaranteed, since it also contends that it will not have to pay for those benefits if plaintiff prevails, its interests are potentially adverse to those of UAW. We find plaintiff's arguments to the contrary to be unpersuasive, and inadequate to carry the shifted burden articulated by the court in *New England Petroleum Corp. v. Federal Energy Administration*, 71 F.R.D. 454, 458 (S.D.N.Y. 1976).

As to the issue of timeliness, we note at the outset that there are no mechanical or arithmetic means by which the timeliness of a motion to intervene may be measured. Rather, as noted by the Supreme Court in *NAACP v. New York*, 413 U.S. 345, 365-366 (1973):

Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion.

Particularly in light of the Seventh Circuit's refusal to entertain an interlocutory appeal in this cause—based in part, upon the Court's desire for "the making of [an] additional record",

see, Misc. No. 77-8048 (April 20, 1977)—and it appearing that neither plaintiff nor defendant would be prejudiced by UAW's intervention, and that such intervention would not delay the ultimate disposition of this action, we find that UAW's motion to intervene is timely. See, e.g., *McCausland v. Shareholders Management Co.*, 52 F.R.D. 521, 524 (S.D.N.Y. 1971), and *Kozak v. Wells*, 278 F.2d 104, 109 (8th Cir. 1960).

In light of the foregoing, UAW's motion to intervene as a party defendant is granted, and UAW will be permitted to file its answer instanter.

ENTER:

ABRAHAM LINCOLN MAROVITZ
JUDGE

DATED: June 9, 1977

[Caption Omitted In Printing]

ANSWER OF UAW

[Filed With Motion For Leave to Intervene April 5, 1977]

COMES NOW, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), by counsel, and for its Answer to the Complaint, and each paragraph thereof, says the following:

1. Admit.
2. Admit the first two sentences. As to the third sentence, no answer is required since the 1958 collective bargaining agreement speaks for itself. Admit the fourth sentence. As to the fifth and sixth sentence, no answer is required since the

documents speak for themselves. Admit the seventh and eighth sentences. In all other respects, deny.

3. No answer is required, since the document speaks for itself; but, in any event, deny.

4. Admit.

5. Admit.

6. Deny.

7. Admit.

8. No answer is required, since the document speaks for itself; but, in any event, deny.

9. Admit.

10. Admit, except deny that a termination date has been established for purposes of §§4041 & 4048, 29 USC §§1341 & 1348.

11. The UAW is presently with sufficiently accurate and up-to-date information upon which to admit or deny the allegations of §11, and therefore they are denied.

12. Deny the first sentence. No answer is required to the second sentence, as the IRC and Regulations thereunder speak for themselves; but, in any event, deny.

13. Admit the first sentence. Deny the second sentence.

14. Admit.

15. Admit.

16. Admit the first sentence. No answer is required to the second sentence, since the document speaks for itself; but, in any event, deny.

17. Deny in all respects, including each subparagraph.

18. Admit.

19. Admit the PBGC has internally determined, pursuant to §4041(c), 29 USC §1341(c), that a Notice of Insufficiency should issue. Admit the PBGC will, unless enjoined, issue

such a Notice. Admit that the PBGC seeks, or will seek to recover all or part of the determined deficiency from Nachman Corporation, pursuant to §4062, 29 USC §1362. Admit the last sentence. In all other respects, deny.

20. Admit.

DEFENSE

Plaintiff has failed to state a claim upon which relief may be granted.

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General Counsel

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By M. JAY WHITMAN
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By _____
Harold A. Katz
Attorneys for UAW

Dated: April , 1977.

[Caption Omitted In Printing]

**MOTION FOR JUDGMENT ON THE PLEADINGS
OR FOR SUMMARY JUDGMENT**

[Filed April 28, 1977]

Now comes NACHMAN CORPORATION, plaintiff herein, by its attorneys, and moves the court for judgment on the pleadings or, in the alternative, for summary judgment, on the ground that the memorandum opinion of this court entered on March 24, 1977, the order entered pursuant thereto and the transcript of proceedings of March 24, 1977 (copies of which opinion, order and transcript of proceedings are attached hereto and marked Exhibits A, B and C, respectively), along with the briefs of the parties in support of and in opposition to defendant's motion to dismiss, dispose of all material issues in this matter and entitled plaintiff to judgment as a matter of law.

Respectfully submitted,

NACHMAN CORPORATION

By:

Robert W. Gettleman
One of its Attorneys

SELWYN ZUN

LAWRENCE R. LEVIN

ROBERT W. GETTLEMAN

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D'ANCONA, PFLAUM, WYATT & RISKIND

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[Caption Omitted In Printing]

**MOTION OF DEFENDANT PENSION BENEFIT
GUARANTY CORPORATION
FOR SUMMARY JUDGMENT**

[Filed June 16, 1977]

The defendant Pension Benefit Guaranty Corporation, pursuant to Fed. R. Civ. P. 56, moves this Court to grant summary judgment in its favor on the grounds that there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

Respectfully submitted,

HENRY ROSE/ESQ

Henry Rose
General Counsel

E. CALVIN GOLUMBIC

E. Calvin Columbic
Assistant General Counsel

CHRISTINE O. COOK

Christine O. Cook
Special Counsel

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[Caption Omitted In Printing]

**DEFENDANT PENSION BENEFIT GUARANTY CORPO-
 RATION'S STATEMENT OF MATERIAL FACTS AS TO
 WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Fed. R. Civ. P. 56(c), defendant Pension Benefit Guaranty Corporation submits the following statement of material facts as to which there is no genuine issue:

1. Plaintiff Nachman Corporation ("Nachman") is an Illinois Corporation having its principal place of business in Chicago and has carried on its manufacturing business at 4560 West Armitage Avenue in Chicago (the "Chicago North Plant"). (Compl., Para. 2.)

2. Defendant Pension Benefit Guaranty Corporation (the "PBGC") is a wholly-owned, independent government corporation charged with the administration of the plan termination insurance program established by Title IV of the Employee Retirement Income Security Act of 1974, §4001 *et seq.*, 29 U.S.C. §1301 *et seq.* (Supp. V, 1975) ("ERISA").

3. The PBGC was established, *inter alia*, to provide for the timely and uninterrupted payment of guaranteed pension benefits to participants and beneficiaries under plans to which Title IV of ERISA applies. §4002(a)(2); 29 U.S.C. §1302(a)(2). Title IV applies to certain defined benefit pension plans. §4021 of ERISA, 29 U.S.C. §1329.

4. On February 29, 1960, Nachman and the United Automobile, Aerospace and Agricultural Implement Workers of America, who represented certain hourly employees of the Chicago North Plant, entered into the Nachman Corporation (Chicago Plant) Agreement and Pension Plan (the "Plan"). (Compl., Para. 2.)

5. The Plan is a defined benefit pension plan. (Compl., Para. 3.)

6. The Plan document limits the pension benefits provided by the Plan to the amount of the Plan's trust fund, to which Nachman contributed, and states that in the event of termination Nachman is not liable or obligated to make additional contributions to fund the benefits provided by the Plan. (Exhibit B to Compl. at 18; Compl. Para. 7.)

7. The Plan terminated on December 31, 1975. (Compl., Para. 10.)

8. As of December 31, 1975, the assets of the Plan's trust fund were insufficient to pay the benefits provided by the Plan which are guaranteed by the PBGC. (Compl., Para. 11.)

9. Since September 2, 1974, when Title IV became effective (§4082(a) of ERISA, 29 U.S.C. §1382(a)), the PBGC has assumed liability for approximately 136 insufficient pension plans terminating on or before December 31, 1975. (Affidavit of Joseph E. Ellinger, Para. 5 attached hereto.)

10. The total amount of plan asset insufficiency of the plans described in Paragraph 9 herein is approximately \$52,785,000. (Ellinger Affidavit, Para. 7.)

11. Approximately 20,995 plan participants are receiving or will receive pension payments for benefits guaranteed by the PBGC under the plans described in Paragraph 9 herein. (Ellinger Affidavit, Para. 9.)

12. Of the plans referred to in Paragraph 9 herein, approximately 78 plans have limitation-of-liability provisions like Nachman's plan. (Ellinger Affidavit, Para. 6.)

13. The total amount of plan asset insufficiency of the plans described in Paragraph 12 herein is approximately \$32,986,000. (Ellinger Affidavit, Para. 8.)

14. Approximately 12,105 plan participants are receiving or will receive pension payments for benefits guaranteed by the PBGC under the plans described in Paragraph 12 herein. (Ellinger Affidavit, Para. 10.)

HENRY ROSE/Esq
Henry Rose
General Counsel

E. CALVIN GOLUMBIC
E. Calvin Golumbic
Assistant General Counsel

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[Caption Omitted In Printing]

AFFIDAVIT OF JOSEPH E. ELLINGER

[Filed June 16, 1977]

I, Joseph E. Ellinger, being first duly sworn, depose and swear as follows:

1. I am 51 years old and reside at 5 West Glebe Rd. Apt. B-12, Alexandria, Virginia 22305.
2. Since September 2, 1974, I have been employed as Director of the Office of Program Operations of the Pension Benefit Guaranty Corporation, which is at present located at 2020 K Street, N. W., Washington, D. C. 20006.
3. Among my responsibilities as Director of the Office of Program Operations is processing all terminated insufficient pension plans to which Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") applies.
4. I am familiar with plaintiff's complaint in this lawsuit.

5. Since September 2, 1974, the PBGC has assumed liability for approximately 136 insufficient pension plans terminating on or before December 31, 1975.

6. Of these plans, approximately 78 have limitation-of-liability provisions like the pension plan involved in this lawsuit.

7. The total amount of plan asset insufficiency of the insufficient plans terminating on or before December 31, 1975, is approximately \$52,785,000.

8. The total amount of plan asset insufficiency of the insufficient plans with limitation-of-liability provisions like the Nachman plan is approximately \$32,986,000.

9. Approximately 20,995 plan participants are receiving or will receive pension payments for benefits guaranteed by the PBGC under all the insufficient plans terminating on or before December 31, 1975.

10. Approximately 12,105 plan participants are receiving or will receive pension payments for benefits guaranteed by the PBGC under plans with limitation-of-liability provisions like the Nachman plan.

[Caption Omitted In Printing]

**UAW's CROSS-MOTION
FOR SUMMARY JUDGMENT**

[Filed June 16, 1977]

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), intervenor-defendant, hereby cross-moves, pursuant to F.R. Civ. Pro. 56, for summary judgment. There are no genuine issues of material fact. As more fully set out in the memorandum filed herewith, the UAW is entitled to judgment as a

matter of law because the Complaint fails to state a claim upon which relief may be granted.

This cross-motion is based on all the pleadings and files in this matter, including the Affidavit of Robert Kryvicky.

WHEREFORE, the UAW respectfully asks that the Court enter summary judgment against plaintiff, and in favor of the UAW, with costs and attorney fees against plaintiff.

[Caption Omitted In Printing]

AFFIDAVIT OF ROBERT KRYVICKY

[Filed June 16, 1977]

STATE OF MICHIGAN } ss.
COUNTY OF WAYNE }

Being first duly sworn, Robert Kryvicky says and deposes as follows:

My name is Robert Kryvicky. My office address is 8000 East Jefferson Avenue, Detroit, Michigan 48214. I am employed by the International Union, UAW, as an actuary. I am an Associate in the Society of Actuaries.

If the Pension Benefit Guaranty Corporation does not guarantee the benefits in the Nachman UAW Pension Plan, I estimate that the assets of the plan are sufficient to provide for only 35% of the accrued vested benefits for 135 employees. Stated in a different way, the average benefit that would be guaranteed by PBGC for these 135 employees is \$77.00 per month but without the guarantee the average benefit that the assets could provide is \$27.00.

Further, affiant sayeth not.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 76 C 2963

NACHMAN CORPORATION,

Plaintiff,

vs.

PENSION BENEFIT GUARANTY CORPORATION
(PBGC).

Defendant,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW).

Intervenor-Defendants.

MEMORANDUM OPINION

[Filed September 16, 1977]

CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Nachman Corporation ("Nachman"), brought this action against the Pension Benefit Guaranty Corporation ("PBGC"), challenging the PBGC's interpretation of certain provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA" or "the Act"), and certain regulations issued by the PBGC based upon its interpretation of the Act.

Nachman seeks a declaratory judgment that it is not liable under §4062 of the Act, 29 U.S.C. §1362 for insufficiencies in funding resulting from its December 31, 1975 termination of the Nachman Corporation (Chicago Plant) Agreement and

Pension Plan, as amended, ("the Pension Plan"), originally created in 1960 pursuant to a collective bargaining agreement between Nachman and the United Automobile, Aircraft and Agricultural Implement Workers of America ("the UAW"), and an order enjoining the PBGC from issuing a notice under §4041(c) of the Act, 29 U.S.C. §1341(c), to the effect that the PBGC is unable to determine whether the Pension Plan's assets are sufficient to meet the benefits guaranteed under ERISA.

Prior to the motions now pending before the Court, the PBGC moved to dismiss the complaint for failure to state a claim upon which relief can be granted under F.R.Civ.P. 12(b)(6). On March 24, 1977, we issued a memorandum opinion denying the PBGC's motion. On March 28, 1977, we certified the order denying PBGC's motion to dismiss for interlocutory review pursuant to 28 U.S.C. §1292(b). The Court of Appeals for the Seventh Circuit denied PBGC's motion for leave to appeal in an order entered on April 20, 1977. By Order of June 9, 1977, we granted the UAW's motion to intervene as a defendant.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331 and 1349, and 29 U.S.C. 1302(b). Pending before the Court is Nachman's motion for summary judgment pursuant to F.R.Civ.P. 56(a), along with separate cross-motions for summary judgment of the PBGC and the UAW, pursuant to F.R.Civ.P. 56(b). Neither party claims a genuine issue of a material fact and, accordingly, both plaintiff and defendants seek a judgment in their favor as a matter of law. For the reasons set forth below, plaintiff's motion is granted and defendants' motions are denied.

I.

In accordance with the collective bargaining agreement between Nachman and UAW, Nachman agreed to establish a pension plan for certain of its hourly rate employees at its Armitage Avenue facility in Chicago. Under the Pension Plan,

employee benefits were to become vested after an employee completed 15 years of service and attained age 45. If an employee with vested benefit rights left his employment before reaching age 65, he would have been eligible to receive benefits at age 65 if the plan had sufficient funds available to pay for the benefits. As a result of the Pension Plan's most recent amendments, 90 day advance notice of intent to terminate was required, which notice could be given at any time after August 31, 1975, to be effective contemporaneously with the expiration of the collective bargaining agreement.

Article V, Section 3 of the Pension Plan specifically limited Nachman's general liability for vested benefits pursuant to the plan to "only such benefits as can be provided by the assets of the Fund" created by the Pension Plan, and "[i]n the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions" to supplement the existing funds in the plan.

The complaint alleges that on October 1, 1975, the first date upon which termination notice could be issued in accordance with the collective bargaining agreement, Nachman gave notice that it was terminating the Pension Plan as of December 31, 1975, due to the unprofitable nature of its operations at its Armitage facility.

There appears to be no question that during the term of the plan Nachman complied fully with the bargained-for funding requirements set forth in the Pension Plan, and that but for the newly created benefit provisions of ERISA and the PBGC's interpretations thereunder, Nachman could have properly terminated the Pension Plan in the manner it did with impunity. The controversy herein centers around the nature of the liability imposed by ERISA on employer-sponsors for the funding of "nonforfeitable vested benefits" in plans which were in existence prior to January 1, 1974, and which were terminated prior to January 1, 1976. Plaintiff contends that under the facts of this case Congress never intended to require post-termina-

tion funding by an employer-sponsor, since at the time the Pension Plan was terminated the nonforfeitable rights created by ERISA had not yet vested in the individual employees under the Plan. The PBGC maintains, however, that since Title IV of ERISA, which created the PBGC and plan termination insurance, became effective prior to the termination of the Pension Plan, the PBGC has jurisdiction to issue notice pursuant to §4041(c) of the Act, 29 U.S.C. §1341(c), and to proceed in accordance with the provisions of §4042 of the Act, 29 U.S.C. §1342.

II.

In enacting ERISA, Congress sought to extend pension benefit protections to the millions of employees and their dependents whose pension funds had terminated without sufficient assets to satisfy the benefit expectations of its subscribers. The Act sets safeguards for the operation of covered plans and establishes standards for the administration of pension plans in an effort to minimize terminations of pension plans and losses to beneficiaries.

Title I of ERISA was enacted for the protection of employee benefit rights, and includes an expedited vesting provision which allows pension benefits to become vested prior to an individual's having reached retirement age. Title II amends the Internal Revenue Code insofar as it relates to retirement plans and includes the requirement of minimum funding of pension plans by employer-sponsors. Title III of the Act creates the Joint Pension Task Force, and sets forth the basic administrative requirements of the Act including the imposition of fiduciary responsibility upon trustees of covered pension plans. Title IV creates the PBGC as a corporate body within the Department of Labor, whose function is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants.

§4041(a) of the Act, 29 U.S.C. §1341(a), requires that prior to the termination of covered pension plans, notice of intent to terminate must first be filed by the employer-sponsor with the PBGC. The PBGC is then required to examine the plan and determine whether the plan's assets are sufficient to pay the guaranteed benefits under the Act. Where the assets are found to be sufficient, the plan administrator is then authorized to terminate the plan. §§4041(b) and (d), 29 U.S.C. §§1341(b) and (d). Where, however, the PBGC is unable to determine whether the plan's assets are sufficient to meet the basic benefit obligations, the plan administrator is to be so notified, §4041(c) of the Act, 29 U.S.C. §1341(c), a trustee is to be appointed to handle the termination of the plan, and the guaranteed benefits are to be paid out through both the assets of the plan and PBGC funds. §§4041(c), 4042(b) of the Act, 29 U.S.C. §§1341(c), 1342(b).

The PBGC itself is essentially a government-owned insurance agency charged with supervision over the termination process of covered pension plans, and with guaranteeing the payment of vested and nonforfeitable benefits to individuals covered by the plans. The financing for the PBGC comes primarily from premium assessments against employer-sponsors of pension plans, which monies are in turn invested by the PBGC in one of the four revolving funds established by §4005 of the Act, 29 U.S.C. §1305. Additionally, however, and in an effort to foreclose employer-sponsor reliance upon and abuse of PBGC insurance protections, the Act grants the PBGC a limited right of subrogation against employer-sponsors whose pension plans are inadequately funded at the time of termination. §§4062(b) and 4068(a) of the Act, 29 U.S.C. §§1362(b) and 1368(a). See, S. Rep. No. 93-383, 93rd. Cong. 1st Sess. 87 (1973).

III.

In §2 of the Act, 29 U.S.C. §1001, Congress recognized that "many employees with long years of employment [were] los-

ing anticipated retirement benefits owing to the lack of vesting provisions in such plans." In an effort to remedy that situation, Congress adopted detailed vesting provisions in §§201-211 of the Act, 29 U.S.C. §1051-1061, which provisions were also made applicable to plans already in existence. In order to allow for appropriate adjustments to those plans which were already in existence, however, Congress postponed the effective date of the vesting provisions for existing plans until "plan years beginning after December 31, 1975."

Thus; in the case of Nachman's Pension Plan, since it was in existence prior to and at the time of the passage of ERISA, and was terminated on December 31, 1975, the vesting provisions of ERISA were never applicable to it.

In setting forth the degree of benefits to be insured and guaranteed by the PBGC, Congress provided in §4022(a) of the Act, 29 U.S.C. §1322(a), that: (emphasis added).

The [PBGC] shall guarantee the payment of all nonforfeitable benefits . . . under the terms of a plan . . .

Under the terms of the Nachman Pension Plan, and in accordance with the law prior to ERISA, it was possible for employee rights under a plan to be vested but subject to forfeiture as a result of underfunding. Accordingly, prior to ERISA the degree of nonforfeitality was directly related to the degree of funding. After ERISA, however, and subject to the effective dates indicated above, benefits became nonforfeitable immediately upon becoming vested; and, in conjunction with the more liberal vesting provisions of ERISA, Congress thereby acted to substantially increase and guarantee the benefits and protections afforded individuals subject to covered plans.

The only definition of "nonforfeitable" found in ERISA appears in §3(19) of the Act, 29 U.S.C. §1002(19), which provides: (emphasis added).

The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant

or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

Though we recognize that this definition is contained in and limited to Title I of the Act, the PBGC has not presented any persuasive reasons for not assuming a similar usage of the term "nonforfeitable" in Title IV of the Act, §4022(a), 29 U.S.C. §1322(a). Rather, as urged by Nachman, the term "nonforfeitable" appears to be used in Title IV just as it is used in Title I. We find support for this conclusion in an axiom of statutory construction, which says: "[a]n earlier specific definition may properly color a subsequent use of the same words without re-definition." *Kent Manufacturing Corp. v. C.I.R.*, 288 F.2d 812, 815 (4th Cir. 1961).

We therefore hold that since the vesting provisions of ERISA were not applicable to Nachman's Pension Plan, the benefits which became vested pursuant to the Pension Plan alone were *not* nonforfeitable, and therefore not subject to guarantee by PBGC under §4022(a) of the Act, 29 U.S.C. §1322(a).¹

PBGC argues, however, that the express language of §4082(a) of the Act, 29 U.S.C. §1381(a) which provides for an effective date of September 2, 1974 for the plan termination

¹ The PBGC points out that the second sentence of §3(19) of the Act, 29 U.S.C. §1002(19) provides:

For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3).

Relying on I.R.C. Temp. Reg. §11.411(a)-4(a), promulgated under the vesting provisions of the Act, the PBGC argues that even if the Title I definition of "nonforfeitable" applies to Title IV, a benefit "conditioned upon a sufficiency of plan assets in the event of a termination or partial termination [is] not considered to be forfeitable." However, the regulation was not applicable to pre-existing plans until after December 31, 1975. I.R.C. Temp. Reg. §410, p.15, "Labor Regulations Affecting Internal Revenue Code."

and insurance program of Title IV, gives the PBGC a right, in the event of insufficient funding upon pension plan termination, to pursue the remedies provided in Title IV even if the benefit had only become "vested" in accordance with the terms of the Pension Plan itself though not "nonforfeitable" as defined in §3(19) of the Act, 29 U.S.C. §1002(19). We disagree.

IV.

We note first that, contrary to the PBGC's assertions, a finding that the Nachman Pension Plan is not subject to the notice and subrogation provisions of title IV of ERISA does not automatically void the first 16 months of the Title IV insurance program, for there certainly are many pension plans that began after September 2, 1974 which are subject to Title IV. Rather, we hold that based upon the particular facts of this case—where the Pension Plan was terminated prior to the date upon which benefits could become "vested" under ERISA—the beneficiaries of the Nachman Pension Plan did not have nonforfeitable interests in the plan. If at all, their vested rights were the result of rights given them under the Pension Plan, which specifically provided in Article V, Section 3 that: (emphasis added).

Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. *In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.*

Under the Pension Plan, though rights to benefits may have become vested, they were specifically made subject to forfeiture in the event of inadequate funding. This was the plan bargained for by Nachman and UAW, and nothing in the Act appears to require the imposition of a more stringent vesting result.

Despite the language in §4082(a) of the Act, 29 U.S.C. §1381(a) which provides for an effective date of September 2, 1974 for Title IV of ERISA, we believe that Congress could very well have intended to extend PBGC insurance coverage to pension plan participants whose rights *had* become fully vested (i.e. nonforfeitable), without imposing the immediate added burden on an employer-sponsor of guaranteeing full funding of all ERISA required benefits for those participants whose rights had *not* become fully vested, at least until such time as the vesting standards and minimum funding requirements of Titles I and II became effective.

We find nothing in the legislative history of ERISA which evidences a contrary intent. Rather, the legislative history of, and the effective dates in Title IV, reflect Congress' primary desire to provide insurance protection to individual participants as expeditiously and efficiently as possible. See, e.g., 120 Cong. Rec. S. 15749 (daily ed. Aug. 22, 1974) (Remarks of Senator Javits). Where a participant's rights had not become fully vested, as that term is used in the Act, however, the notice and subrogation provisions of Title IV are simply not applicable.

The Court is aware, particularly in light of the affidavit accompanying the motion submitted by the UAW, that this decision may be perceived as affecting the pensions of 135 employees. Affidavit of Robert Kryvicky, UAW exhibit, ¶3. It should therefore be reiterated that this decision does not alter the terms of the collective bargaining agreement between Nachman and the UAW. The limitation-of-liability clause, Article V, Section 3 of the Pension Plan, created an expectation both in the participants of the Pension Plan and Nachman.² In this instance, on these facts, the advent of ERISA does nothing to disturb the contractual expectation of Nachman or its employees.

² We do not agree with the UAW's allegation that Article V, Section 3 of the Pension Plan was included in "the fine print" "typical of pre-ERISA defined benefit plans." UAW's Memorandum in Support of Summary Judgment at 8.

The sole issue in this case is Nachman's liability to PBGC, not the PBGC's liability to Nachman's employees. However, as we suggested in our first opinion, that consistent with the expressed Congressional goal of providing immediate insurance protection for participants in pension plans, it is a fair assumption that in cases such as the case at bar, the insurance protection through the PBGC would be available immediately even though the related funding requirements on the employer-sponsor may not yet be in effect. Though Congress certainly desired stricter control and closer supervision over pension plans, it allowed for grace periods to enable employer-sponsors to re-arrange their plans in conformity with the Act.

V.

We therefore agree with plaintiff that it would be illogical to assume that Congress intended to impose immediate funding requirements on an employer-sponsor at a time when, under the provisions of Titles I and II of ERISA, an employee's rights to those very benefits had not yet vested, and the minimum funding requirements were not yet effective.

Accordingly, plaintiff's motion for summary judgment is granted and defendants' cross-motions for summary judgment are denied. We need not address the constitutional issues raised by the parties in their pleadings.

ENTER:

ABRAHAM LINCOLN MAROVITZ
JUDGE

DATED: September 15, 1977

JUDGMENT ON DECISION BY THE COURT

**UNITED STATES DISTRICT COURT
For the
NORTHERN DISTRICT OF ILLINOIS**

No. 76 C 2963

NACHMAN CORPORATION

vs.

PENSION BENEFIT GUARANTY CORPORATION

JUDGMENT

[Filed September 16, 1977]

This action came on for trial (hearing) before the Court, Honorable Abraham L. Marovitz, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged summary judgment in favor of the plaintiff and against the defendants is entered.

Dated at Chicago, Illinois,
this 15th day of September, 1977.

H. STUART CUNNINGHAM
Clerk of Court

By: FRANCES D'ANDRER
Deputy Clerk

**OPINION OF COURT OF APPEALS FILED
JANUARY 23, 1978 WAS APPENDED TO PETITION
FOR WRIT OF CERTIORARI**

Opinion by Judge Sprecher

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 23, 1979.

Before

HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOHN MINOR WISDOM, Senior Circuit Judge*
HON. ROBERT A. SPRECHER, Circuit Judge

No. 77-2146

NACHMAN CORPORATION,

Plaintiff-Appellee,

vs.

PENSION BENEFIT GUARANTY CORPORATION, etc.,
Defendant,
INTERNATIONAL UNION UNITED AUTOMOBILE
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA,
Intervening Defendant-Appellant.

* Senior Circuit Judge John Minor Wisdom, of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

No. 77-2147

NACHMAN CORPORATION,

Plaintiff-Appellee,

vs.

PENSION BENEFIT GUARANTY CORPORATION, etc.,
Defendant-Appellant.
INTERNATIONAL UNION UNITED AUTOMOBILE
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA,

Intervening Defendant.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 76-C-2963
Abraham L. Marovitz, Judge

These causes came on to be heard on the transcript of the
record from the United States District Court for the Northern
District of Illinois, Eastern Division, and were argued by
counsel.

On consideration whereof, it is ordered and adjudged by this
court that the order of the said District Court in these causes
appealed from be, and the same is hereby, REVERSED, with
costs, in accordance with the opinion of this court filed this
date.